Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

DIANE KUHNEL, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated,

Petitioners,

vs.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee, CONTINENTAL CASUALTY CO., AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, TRANSCONTINENTAL INSURANCE COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Superior Court, Appellate Division

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PETITION FOR A WRIT OF CERTIORARI

THOMAS J. VESPER, ESQUIRE
Counsel of Record
WESTMORELAND, VESPER & SCHWARTZ
BAYPORT ONE, SUITE 500
WEST ATLANTIC CITY, NJ 08401
Attorneys for Petitioners

7 HPP

QUESTIONS PRESENTED

In a class action does a state court decision that applies the benefit of its ruling to the plaintiff/class representative and thereafter prospectively only while denying the similarly situated class members a remedy, violate the Fourteenth Amendment of the United States Constitution by denying petitioners their due process and equal protection rights?

Does a state court that adopted the federal retroactivity doctrine and continues to use that doctrine after it has been overruled by the Supreme Court of the United States violate the Supremacy Clause of the United States Constitution?

Do state courts have more discretion than federal courts to pick and choose who shall have the benefit of a ruling when to do so has been found to be a violation of a constitutionally grounded, fundamental right of equal treatment of litigants?

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Petitioners, Diane Kuhnel, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated, respectfully request that a writ of certiorari be issued to review the judgment of the New Jersey Superior Court, Appellate Division, in this case.

OPINIONS BELOW

The New Jersey Supreme Court denial of certification is not published and unreported. The New Jersey Superior Court, Appellate Division, is reported at Kuhnel v. CNA Insurance Companies, 322 N.J. Super. 568 (1999). The opinion of the New Jersey Superior Court, Chancery Division, sub-proceeding Docket Number ATL-C-184-94 made November 6, 1997 is not published and unreported.

STATEMENT OF JURISDICTION

The decision of the New Jersey Superior Court, Appellate Division was made on June 30, 1999. The New Jersey Supreme Court denied petitioners' application for certification on January 21, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part, "Nor shall any state deprive a person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV§1.

Article VI Clause 2 of the United States Constitution which provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. Art. VI cl.2

STATEMENT OF THE CASE

The fundamental question in this class action case is whether a state court, when interpreting a state statute, can, after concluding that defendant had violated that statute, apply its ruling to benefit the named plaintiff only while denying the class members any remedy. The state Appellate Court affirmed the trial court's decision and the state Supreme Court denied certification for review. The legal justification for the court's application of its holding in a selective manner was state legal precedent based on this court's initial approval of selective retroactivity enunciated in Chevron Oil v. Huson, 404 U.S. 97 (1971). The present conflict between New Jersey courts and the United States Supreme Court arises because this Court subsequently overruled the specific portion of the Chevron Oil holding upon which the decision in this case was based. Some background is appropriate to consideration of the significance of the issues presented.

BACKGROUND

In 1994, Diane Kuhnel filed a class action lawsuit, Kuhnel v. CNA Insurance Company, Docket Number ATL-C-184-94, N.J. Super.(Ch. 1994), claiming she and others similarly situated were deprived of their full workers' compensation recovery by CNA Insurance Company by virtue of CNA including illegal charges in its lien and collecting those charges from her third party recovery. The dispute required the interpretation of state

statute N.J.S.A. 34:15-40 that described what employers or their insurers could include in a lien that was recoverable from a workers third party recovery. Both parties to the action moved for declaratory and summary judgments on the statutory interpretation which was also the primary liability issue and the court ruled in favor of the plaintiff and against the defendant. Prior to this result, the court had certified the Class. The Court also held that the return of the wrongfully included lien amounts would be limited to only the named plaintiff individually, and denied recovery to the class members who were similarly situated. The ruling was applied prospectively only, except for the plaintiff, despite the status of the class members as parties to the action. That is to say, one party to the action got a remedy but the rest were denied a remedy. The justification was that this was a case of first impression and that allowing the remedy to class members or any person whose claim may have arisen before the decision was announced would be a burden on the administration of justice. This decision was affirmed on appeal to the Appellate Court citing the New Jersey Supreme Court decision in Coons v. American Honda Motor Co., Inc., 96 N.J. 419 (1984) (Coons II) as their authority for the exercise of discretion by the trial court.

JURISDICTION INVOKED

There was no pre-decision briefing or argument relating to this specific issue at the trial court level and on appeal argument centered on the trial court's abuse of discretion under New Jersey law, since the application of selective prospectivity had no precedent in New Jersey in the context of a class action where actual parties to the case were excluded from recovery. While petitioners never specifically raised the Fourteenth Amendment in its brief or argument, it repeatedly argued the obvious inequities of a decision that determined what the law was but deprived them of its benefit without a legal reason.

The first specific reference to the constitutional issue was in the Brief in support of the petition for certification to the New

Jersey Supreme Court where petitioner said: (Brief attached in relevant part in Appendix A)

> "The Supreme Court's language in Harper v. Virginia, 509 U.S. 86 (1993) raised the inference that selective prospectivity itself violates the due process clause of the Fourteenth Amendment and may not be applied by a state court even in interpreting state law questions. Clearly, selective retroactive applications similarly raised significant due process and equal protection concerns." (page 8A, Appendix A)

And again:

> "Because Coons II, infra, adopted the Chevron Oil test, which has now specifically been severely limited by the United States Supreme Court (in subsequent cases) in a way that bears directly on petitioner's cases, this Court should revisit Coons II and correct the current confusion caused by the conflict between these cases (Coons II) and the United States Supreme Court decisions." (Supremacy Clause Inferred) (Page 9A, Appendix A)

The New Jersey Supreme Court denied certification.

In its application the Petitioners pointed out to the New Jersey Supreme Court the serious conflict between the jurisprudential logic set forth in the group of United States Supreme Court cases modifying the Chevron Oil rule with that of Coons II decision. And since the Coons II standard, which established for New Jersey the discretionary approach to adjudicative retroactivity, and was in fact based on this Court's holding in Chevron Oil, has since been overruled, it was logical to assume that the Court would then grant certification in order to

correct its former decision. However, the New Jersey Supreme Court failed to do so.

ARGUMENT

Although the general rule of adjudicative retroactivity had been followed by courts for hundreds of years (see Justice Scalia's discussion of the long history of adjudicative retroactivity in his concurring opinion in the Harper, 509 U.S. at 106-107 (Scalia, J., concurring), this Court in the 1960's began to limit some decisions to prospective application. Linkletter v. Walker, 381 U.S. 618 (1965). Shortly thereafter, the Court started to apply new statutory rules to pending cases, even when the statute had been passed subsequent to the events giving rise to the litigation. Both of these developments represented departures from traditional retroactivity doctrines that eventually proved unsatisfactory. In the most recent decisions, this Court has substantially retreated from these departures, leaving some degree of ambiguity in its wake.

The evolution of the retroactive-prospective dichotomy in civil cases centers on judicial discretion and drifted towards elevating practicality over long-established legal principles. Because it did not involve traditional legal or factual issues such as fault, breaches of conduct, illegal acts or wrongdoings, nor remedies themselves, courts began to write outside the lines feeling free to determine, as a matter of discretion, who was eligible to receive a remedy. This concept tends to be messianic and potentially flawed since one could not imagine a more fundamental aspect of the due process of law than guaranteeing litigants a remedy for a wrong done to them. This issue concerns not why, when or how justice is dispensed, but if at all and to whom.

Giving selective affect to a civil ruling is a two edged sword and though it was applied in most reported cases to afford a remedy to a party (including Coons II and Chevron Oil), it can also be used to deny a remedy, as it was in this case. Our case is a

class action, the purpose of which is to achieve judicial economy and encourage counsel to bring claims that would not, because of the amount in controversy, be otherwise brought individually. Clearly, class actions are a way to achieve justice for the little guy. This case completely disregarded the intent and purpose of class actions by denying all of the class members' rights. Using classic complaint language, the caption of this case describes the plaintiffs as, "Diane Kuhnel, individually and on behalf of workmens' compensation lien payers similarly situated." (emphasis added)

This Court has made it crystal clear that in cases involving federal law the lower court's choices for application of its holdings must either be retroactively or in rare cases prospectively applied. The discretion of distinguishing among litigants (but not between parties) that is permitted by the Chevron Oil analysis is no longer an option since James B. Beam Distilling Company v. Georgia, et al, 501 U.S. 529 (1991), which held that the law that is applied to one litigant must be applied retroactively to all similarly situated litigants. Selective prospectivity no longer exists in federal law. Of the six justices who agreed upon doing away with selective prospectivity in Beam, three (Blackmun, Marshall and Scalia) would have also done away with pure prospectivity, while the other three (Souter, Stevens and White) did not address that issue. In the Harper case, Justice Thomas' opinion went further and may have invalidated pure prospectivity as well as selective prospectivity, although because pure prospectivity was not an issue in the case, that reference may have been dicta. Nonetheless, in a later decision the Court characterized Harper as, "...establishing a firm rule of retroactivity..." (Landgraf v. USA Film Products, 511 U.S. 244 n.32 (1994)).

Petitioner's plight depends on whether its facts and circumstances resulting in a holding clearly contrary to the federal law is also unconstitutional as depriving petitioners of due process and equal protection. Put another way, is the selective

prospectivity found in our case, contrary to just federal law, or is Harper the law of the land that governs this case? To say that this Court's judicial logic in both Beam and Harper is so compelling that it should apply to all citizens is probably an oversimplification. *But, how does one explain to the members of the class in this case that if they had brought suit alleging violation of a federal statute, they would have recovered their wrongfully taken monies, but since it involves a state statute, they are foreclosed of their recovery and left without a remedy.* The issue here is ripe for this Court to extend its holdings in Beam and Harper to all Americans. It is intellectually dishonest to say that because Article III's Case and Controversy Clause does not appear in the New Jersey Constitution that this suffices to deprive litigants in New Jersey of a remedy for a wrong. The right to recover once a wrongdoing has been proved is much too basic to be frittered away by discourse involving the niceties of constitutional differences in grants of judicial power between the state courts and the federal courts. The injustice done in our case must be protected by the Due Process and Equal Protection clause of the United States Constitution.

Regardless of whether the issues involve state or federal law, all litigants should be able to expect equal treatment. Put another way, once a case is decided, those entitled to recovery should receive it and it makes no sense at all that state courts should have the discretion that this Court has denied itself and all other federal courts to deprive parties or other litigants of their remedy.

Beam refers to how basic the right is, saying, "But selective prospectivity also breaches the principal that litigants similarly situated should be treated the same, a fundamental component of stare decisis and the rule of law generally." (emphasis added) Beam, 501 U.S. at 537.

Chevron, in adopting the theory allowing the courts to simply pick and choose among similarly situated litigants was a

departure from basic judicial tradition. But, Beam said that, "But we never employed Chevron Oil to the end of modified civil prospectivity." Id. at 538, admitting that the principle may have been ill-conceived. The problem, however, is that at least 27 states have adopted the Chevron Oil test and given the result in this case, one must assume it is not an isolated example of the utilization by the state courts of the Chevron Oil license granted to them by this Court. The Court seems to infer a due process/equal protection right by saying its holding is based on "...principles of equality and stare decisis prevailing over any claim based on the Chevron Oil analysis." (emphasis added). Id. at 540. Justice Blackmun, in his concurring opinion, places the issue squarely as one of judicial integrity saying, "It derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are or may still come to court." Id. at 547 -548. In our case below, the remedy for the wrongdoing was not even applied to the other parties to the action, let alone to litigants in pending cases. Shouldn't the "integrity of judicial review" that Justice Blackmun speaks of be assured nationwide? And, doesn't the constitution guarantee that integrity to all Americans.

In the Harper case, the Court in referring to its former decision in Griffith v. Kentucky, 479 U.S. 314 (1987) said that the holding rested on two basic norms of constitutional adjudication. The first norm was the Article III case in controversy restriction on the court's ability to utilize the legislative prerogative to make laws prospective, and the second was that, "...selective application of new rules violates the principle of treating similarly situated [parties] the same." Harper, 509 U.S. at 87. The Court's references to two norms of constitutional adjudication unmistakably gives the second norm quoted above its constitutional linkage and must be attributed to the Fifth Amendment where federal law is concerned or the Fourteenth Amendment where state law is in issue.

In this case, the decisions of the New Jersey courts are unabashedly in conflict with this Court's decision in Harper,

thereby rendering them unconstitutional.

While it can be argued that Harper's frequent references to their holdings applying to federal law leaves state courts free, "...to limit retroactive operation of their own interpretations of state law." The Court further said it, "...suggests that the Supreme Court of Virginia has simply incorporated into state law the three-pronged analysis of Chevron Oil." Harper, 509 U.S. at 99. The Court then says, "The Supremacy Clause, U.S. CONST. Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." If it means what it says, then states like New Jersey, who adopted the Chevron Oil analysis, may not apply that analysis now that it has been overruled.

Petitioners read Harper to mean that while state courts may still be free to apply their holdings retroactively or prospectively, they may not be permitted to in the future to apply them selectively, i.e. to a party to litigation and thereafter prospectively only. Certainly it rules out applying the ruling to only the plaintiff in a class action and not to the members of a class who were also parties to that action and bound by the judgment.

Finally, Harper refers to the principle, "That constitutional sufficiency of any remedy..." saying that, "Virginia is free to choose which form of relief satisfies the minimum federal requirements we have outlined. ...but under no circumstances may it confine petitioners to a lesser remedy."Harper, 509 at 102. While the court was specifically discussing a pre-deprivation process that allowed enjoining the imposition of a tax, a major issue in Harper, the principle of the constitutional sufficiency of a remedy is no less relevant to petitioner's case since they not only received a lesser remedy than what they would have received in Federal Court, but were in the end totally deprived of any remedy.

This Court has abandoned the rule of selective or modified prospectivity and has done so because it violates the fundamental principle that litigants in similar situations should be treated the same. The one principle found in the evolution of these cases from Linkletter through Harper is the equality of treatment under the law. This surely must be guaranteed by the United States Constitution to all Americans in all circumstances, when they have prevailed in a court, whether state or federal, and expect a remedy. While none of the cases specifically named the Fifth Amendment or the Fourteenth Amendment as the basis for their decision, several (Harper 509 at 94-95, 102. and Griffith 479 at 323.) referred to the basis being Constitutional. There are also references to the Supremacy Clause depriving the states of misusing the federal retroactivity doctrine. The petitioners in this case have been the victims of both a misuse of federal retroactivity doctrine and as class members similarly situated to their class representatives have been treated unequally and deprived of their rights under the United States Constitution.

REASONS FOR GRANTING THE WRIT

The petitioners writ of certiorari should be granted because the decisions below are in conflict with this Courts important prior rulings providing for equal treatment to similarly situated litigants as a constitutional requirement and asserting the supremacy of federal law. The manner in which the members of the class in this case were deprived of their constitutional rights by the Court below exemplifies the justification and wisdom inherent in this Courts overruling of the open ended discretion to pick and choose who shall received the benefits of a ruling laid out in Chevron Oil case but now overruled.

The fact that New Jersey adopted the Chevron Oil retroactivity doctrine and continues to apply that portion that has been overruled, allows it to escape the judicial logic clearly set out in this Court's cases first overruling Chevron Oil and then firmly establishing the correct retroactivity doctrine. The

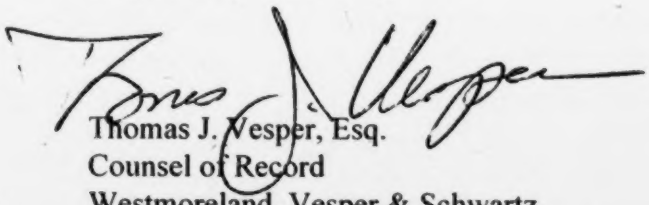
doctrine, for purposes of this case, was most relevantly explained in the Harper and Beam decisions previously discussed which provide the constitutional underpinnings of the retroactivity doctrine. Neither those decisions nor as yet any decisions before this Court involved state law and this Court has not yet specifically made its retroactivity doctrine binding on State Courts when interpreting a state statute. This case is the perfect vehicle for such an extension because of the egregious result it produced on the petitioner litigants. It must be corrected. Most states have adopted the Chevron Oil analysis making the problem of misuse of that doctrine nationwide with the potential of undermining the integrity of judicial review nationally.

When certified members of a class as parties to the action are deprived of the remedy afforded their class representative based on nothing more than judicial discretion, it cannot survive constitutional scrutiny. To contemplate this kind of misuse by a state of the now discredited federal retroactivity doctrine cannot be allowed to go unchecked throughout the several states. This Court initiated the since abandoned doctrine and must now put an end to it.

By granting the Petition for Certiorari this Court can review the New Jersey State Court decision which conflicts with its own now well settled law and establish the petitioner's constitutional rights to equality of treatment.

Accordingly the petitioners respectfully request that this petition for Writ of Certiorari be granted.

Respectfully submitted,



Thomas J. Vesper, Esq.
Counsel of Record
Westmoreland, Vesper & Schwartz
Bayport One, Suite 500
West Atlantic City, NJ 08232

APPENDIX

SUPREME COURT OF NEW JERSEY
C-500 September Term 1999
48,413

DIANE KUHNEL, etc.,

Plaintiff-Petitioner,

v.

CORRECTED ORDER
ON PETITION FOR CERTIFICATION

CNA INSURANCE COMPANIES, etc., et al.,

Defendants-Respondents.

FILED
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Stephen Townsend
(Replicaion of stamp)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4349-97 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 19th day of January, 2000.

Stephen Townsend
Clerk of the Supreme Court

I hereby certify that the forgoing
is a true copy of the original on file
in my office
Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY
(Replication of stamp)

THE FOLLOWING ARE EXCERPTS RELIED UPON IN THIS PETITION FROM THE BRIEF FOR THE PETITION FOR CERTIFICATION TO THE NEW JERSEY SUPREME COURT AND ARE ATTACHED AS VERIFICATION THERETO.

STATEMENT OF MATTERS INVOLVED

It is imperative that this Court revisit its decision in Coons v. American Honda Motor Co., 96 N.J. 419 (1984) (hereinafter "Coons II"). In that case the Court announced the standards for determining retroactive versus non-retroactive application of holdings in adjudicated cases. The courts below in the cases at bar misapplied Coons II. In addition, the continued vitality of Coons II should be reconsidered in light of recent U.S. Supreme Court holdings in Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995); Harper v. Virginia Dept. of Taxation, 599 U.S. 86 (1993); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) and Griffith v. Kentucky, 479 U.S. 314 (1987). Collectively, these decisions have severely restricted the applicability of Chevron Oil v. Huson, 404 U.S. 314 (1971), upon which this court significantly relied in deciding Coons II.

This Petition for Certification arises from the lower court's new and flawed interpretations of Coons II that could render uncertainty or grant unfettered discretion to the lower courts to determine the applicability of every court decision construing a state statute. This Petition also provides the Court with the perfect vehicle for its review of Coons II to determine whether that decision requires modification now that Chevron Oil has been dramatically restricted by recent U.S. Supreme Court decisions.

The following specific issues are raised by the trial court and Appellate Division decisions:

1. May an injured New Jersey worker be denied full recovery guaranteed him or her by the New Jersey Workers' Compensation Act and case law on the basis that such a denial of

rights will avoid an alleged burden on the administration of justice?;

2. In a lawsuit certified as a class action, may the court enter a declaratory judgment construing a statute and then restrict any recovery based on that declaration to the plaintiff individually and thereafter prospectively, thereby denying the similarly situated members of the class any protections from the declaration and instead leaving them bound by a judgment premised upon an incorrect construction of the law?;

3. Should all settled matters later found to be illegal, resulting in damages to one party and unjust enrichment to the other, where neither *res judicata* nor the Statute of Limitations or repose is an issue, be shielded from review by immunizing them from application of the law?;

4. Does a trial court's discretion extend to determining the public policy of New Jersey without the benefit of any evidence before it supporting its conclusions?; and

5. May a party against whom a judgment of unjust enrichment has been entered be relieved of its legal obligation to return the ill-gotten funds because it could be troublesome for that party?

This matter involves plaintiffs Diane Kuhnel (hereinafter "Kuhnel") and James Streeper (hereinafter "Streeper"), who filed class action suits against CNA Insurance Companies (hereinafter "CNA")and Aetna Insurance Companies (hereinafter "Aetna") respectively, for violation of N.J.S.A. 34:15-40 of the Workers Compensation Act (hereinafter "The Act") to wit: in Kuhnel's case including in their lien against the plaintiff's third-party tort recovery as "compensation" the petitioner's portion of the court assessed legal fees and medical expert fees and, in Streeper's case including rehab nurse/administrative costs as "medical expenses." The Kuhnel class was certified, and on plaintiffs' motion for declaratory judgment, the court agreed with the plaintiff's statutory construction and resolved the question as one of first impression, even though the court merely quoted and relied upon N.J.S.A. 34:15-12 & 13 in defining what compensation is (Kuhnel) and N.J.S.A. 34:15-15 in defining what medical

expenses were (Streeper) under Section 40. Following that, the trial court held that its decision would not be applied to the certified class, but restricted it to afford a remedy to the plaintiff only as an individual and, thereafter, prospectively.

The Court's reasons for denying justice to so many injured workers who had been denied their full recovery was based upon the assumption that retroactive application would create a burden on the administration of justice that outweighed the rights of the claimants. This misuse of discretion was totally speculative, without the benefit of a shred of evidence that such a burden even existed or was likely to occur. Indeed, this speculative assumption directly contradicted the trial court's previous determination that maintenance of the case as a class action would be manageable and not cause any undue burden. The court's ruling deprived injured New Jersey workers of a full recovery contrary to the legislative intent of The Act as construed by this Court in previous decisions.

Plaintiffs appealed the trial court's decision on this and other issues, which resulted in the Appellate Division's decision affirming the lower court, saying that ". . . even assuming that the application of Section 40 presents no new rule of law or the defendants failed to demonstrate a reasonable basis for reliance on their interpretation of Section 40, we agree with Judge Gibson's analysis and suggest that the impact of such an application on the administration of justice is dispositive." Kuhnel v CNA Ins. Co., 322 NJ Super. 568(App. Div. June 30, 1999).

QUESTION PRESENTED

In a class action where the class has been certified, may a Court, when rendering a declaratory judgment interpreting a statute, restrict the application of its declaration of what the law is to apply only to the named plaintiff and thereafter prospectively only, while entering judgment applying the incorrect law to the other parties who are similarly situated members of the certified class?

COMMENTS ON COONS II AND RECENT U.S. SUPREME COURT CASES

This Court in Coons II reversed its own earlier decision, noting that the first decision was ". . . made without the benefit of any adversary hearing directed to the point..." Coons, 96 N.J. at 425. The Court was referring to the consideration of whether to apply the general rule of retroactivity or to deviate from that rule and give the decision prospective application only. This is a vital point because the Supreme Court here admits the difficulty this issue presents without the benefit of an adversary hearing and briefs, and it bears directly on this case because there was no such hearing conducted at the trial level and the Appellate Division was confined to the record below.

Coons II said its decision was "...application of principles from our own state court decisions, as well as from the United States Supreme Court cases." Id. This implies the Court, if not adopting the Chevron Oil v. Huson test, clearly agreed with its reasoning.

Coons II permits selective prospectivity by applying the new rule "...to the parties in the case announcing the new rule..." Id., and then prospectively only, citing to State v. Burstein, 85 N.J. 394 (1981) and State v. Nash, 64 N.J. 464 (1974), both of which are criminal cases. The Court said that choices of application are based on ". . . what is just and consonant with public policy..." Id. and "...sound policy grounds may justify limiting the retrospective effect of overruling precedent." Id. at 426.

The Coons Court then launched into a lengthy and full discussion of the Chevron Oil case, saying that, "First, the decision to apply non-retroactivity must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression where resolution has not been foreshadowed." Id. at 427. [emphasis added] The Court continued, saying that New Jersey "...anticipated the Chevron analysis, at least to the extent of its

heavy emphasis on the element of reliance." Id. at 428. [emphasis added]

While a casual reading of Coons II might permit selective prospectivity, a closer analysis shows a condition precedent of some change in the law resulting in a new principle as well as a finding that one of the litigants relied on the old law. Neither of these factors was put forward by defendants, nor were they considered by the lower courts. But see Coons II, which quoted extensively from Chevron Oil and essentially adopted its holding, saying, "Turning to the critically important factor of reliance, the focus at the outset on what it is that litigants may have relied on..." Id. at 433, and, "Finally, following Chevron..." Id. at 434.

Coons II also referred to satisfying the Chevron-Salario formulation (Salario v. Glaser, 93 N.J. 447 (1983)) by quoting Salario as saying, "...all questions of civil retroactivity continue to be governed by the standard enunciated in Chevron..." Id. at 431. Again quoting Salario, the Coons II court said, "...at issue must be the equivalent of a new rule of law." Id. at 430. And finally, in quoting Burstein it said, "As the term applies, non-retroactivity can arise only where there has been a departure from existing law." Id.

All of the foregoing seem to have been ignored or overlooked by the lower courts.

As stated above, this Court in Coons II relied heavily on the reasoning of the U.S. Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Since Coons II, however, the U.S. Supreme Court has severely undercut the reasoning of Chevron Oil in a series of cases cited *supra*, p.1. Because Chevron Oil has been drastically constricted by decisions since Coons II, this court should now re-examine Coons II in light of the dramatic changes in U.S. Supreme Court jurisprudence.

In the article *Retroactivity and Legal Change* (110 Harvard Law Review 1055, 1997) the writer reviews current United States Supreme Court decisions pertinent to our inquiry here. The primary inquiry was the status of selective prospectivity, a previously approved option of the courts found in the Chevron Oil test which allowed the courts to distinguish

among litigants, applying the new rule to some and the old rule to others. While retroactivity examined the extent to which litigants have relied on the old rule, selective prospectivity added a layer of inquiry which applied the new rule to the litigants who got to court first, while defeating the litigants whose cases had proceeded less rapidly. This is gleaned from the holdings in Griffith and Beam, as well as other cases.

Griffith v. Kentucky, 479 U.S. 314 (1987), a criminal case, established that a new rule of law must be applied retroactively to all cases pending on direct rule or not yet final, and selective application violates the principle of treating similarly situated parties the same.

In James B. Beam Distilling Company v. Georgia, 501 U.S. 529 (1991), the Court held that selective prospectivity was abandoned in the criminal context in Griffith and that the equality principle enunciated in Griffith applies to civil cases as well. This effectively necessitated limiting the application of the Chevron test. As the Court explained, "...it may not distinguish between litigants for choice of law purposes on the particular equities of their claim to prospectivity. It is the nature of precedent that the substantive law will not shift and spring on such a basis." Id. at 530.

Beam continues, "It is only when the law changes in some respect that an assertion of non-retroactivity may be entertained." Id. at 534. Clearly, cases of first impression do not involve a change in the law or a departure from previous law, and therefore are now effectively removed from the Chevron Oil test adopted by Coons II. In fact, all statutory constructions, in the absence of a finding of reliance on prior interpretation, cannot even be considered in the Chevron Oil test and even if they could, selective prospectivity could not be applied to the decision. The Court in Beam reiterated that the general rule of full retroactivity reflects the declaratory theory of law in saying "...according to which the Courts are understood only to find the law, not to make it." Id. at 535, 536.

Ironically, the trial court's decisions in Kuhnel and Streeper were both in response to plaintiffs' motion for

declaratory judgment where the court declared what the law is and then proceeded to give it selectively prospective application only.

The Beam court admitted that it has accepted the concept of pure prospectivity and examines the Chevron Oil test to clarify what it meant in that case in relation to the requirements for a finding of non-retroactivity. The court reiterated that the Chevron Oil test required that to obtain non-retroactivity a party must show both reasonable reliance on the new law and the inequities that result from retroactive application. But the court also noted, ". . . we have never employed Chevron Oil to the end of modified civil prospectivity." Id. at 538. The Appellate Division below ignored the requirement of a new rule of law in its holding, saying the burden on the administration of justice is alone dispositive.

The Beam Court makes clear that retroactive application is limited by *res judicata* and the statutes of limitations and repose. Note here that neither CNA nor the Court ever raised or discussed the issue of *res judicata* since it obviously does not apply and the issue of statutes of limitations had been earlier ruled on by the trial court to limit the recoveries to a six year term.

In Beam, Justice Blackman's concurring Opinion (with whom Justice Marshall and Justice Scalia joined) put it this way, "It derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are or may still come to Court. We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce." Id. at 547, 548.

In Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), the Supreme Court followed the Beam decision and reversed the refusal of the Virginia Supreme Court to give full retroactive effect to a prior U.S. Supreme Court ruling. The court's language raised the inference that selective prospectivity itself violates the due process clause of the Fourteenth Amendment and may not be applied by a state court even in interpreting state law questions. Clearly, selective retroactive application similarly raised significant due process and equal protection concerns.

In Harper, the Supreme Court explained that its new

jurisprudence generally requiring retroactive application of newly declared legal rules rested on two basic norms of constitutional adjudication. "First we reasoned that the nature of judicial review strips us of the quintessentially legislative prerogative to make rule of law retroactive or prospective as we see fit....Second, we concluded that selective application of new rules violates the principle of treating similarly situated parties the same.", and that, "After the case announcing any rule of federal law has applied that rule with respect to the litigants before the Court, no Court may refuse to apply [that] rule retroactively." Id. at 95, 96.

Reynoldsville Casket Company v. Hyde, 514 U.S. 749 (1995) reinforced Beam and Harper. There the court rejected an Ohio court's attempt to circumvent their restriction of Chevron Oil through the fiction of merely providing a selectively prospective remedy. The Court rejected such a fiction and insisted upon full retroactive effect to its prior determination that a provision of Ohio law was unconstitutional. The decision rendered a state court powerless to grant selective prospectivity when its own statutes are declared unconstitutional. The Kuhnel case is a perfect example of inappropriate selective prospectivity, not merely because the lower courts applied the holding to the named plaintiff and thereafter prospectively only, but also because it is a class action where the court also excluded other parties to the action who were similarly situated from the application of its holding. Streeper, too, is an appropriate case for review, because the trial court used its selective prospectivity ruling as a basis for denying as moot class certification.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

1. Because Coons II adopted the Chevron Oil test, which has now specifically been severely limited by the United States Supreme Court in a way that bears directly on petitioners' cases, this Court should revisit Coons II and correct the current confusion caused by conflict between these cases and the United States Supreme Court decisions.

2. The trial court's decision, affirmed by the Appellate

Division, conflicts with Coons II and represents a dangerous precedent that could affect the applicability of all judicial constructions of state statutes, especially to the extent the decision allows virtually unfettered discretion to trial courts on the question of selective prospectivity.

3. The lower court's holdings could result in gutting the purpose and effectiveness of class actions by authorizing courts to ignore R. 4:32-2(a) by not ruling on class certification before deciding the merits and by applying different law to the class representative versus the class members and depriving class members of a remedy for their injury.

4. The Court, in its supervisory capacity, should provide further legal and procedural safeguards and additional direction and guidelines to the lower courts in deciding the difficult issue of non-retroactivity.

The foregoing satisfies R. 2:12-4 by raising issues of general public importance, pointing out conflicts with other decisions, exposing the necessity for this Court's intervention and supervision and requiring its consideration of the interests of justice.

Respectfully submitted,
WESTMORELAND, VESPER &
SCHWARTZ

By:_____
R. C. Westmoreland, Esq.

Date: October 7, 1999

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4349-97T3
A-4689-97T5

DIANE KUHNEL, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated,

Plaintiffs-Appellants,

v.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee, CONTINENTAL CASUALTY CO., AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, TRANSCONTINENTAL INSURANCE COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY,

Defendants-Respondents.

JAMES STREEPER, and ANTHONY GAITANOS, individually, and on behalf of all other Workers' Compensation Lien Payers similarly situated,

Plaintiffs-Appellants/
Cross-Respondents,

v.

AETNA INSURANCE COMPANY, a New Jersey Workers' Compensation Lien Payee,

Defendant-Respondent
Cross-Appellant.

Argued May 25, 1999 - Decided June 30, 1999 -

Before Judges Kestin, Wefing and Carchman

On appeal from Superior Court of New Jersey, Chancery Division, Atlantic County.

Robert S. Kitchenoff argued to cause for appellants in both appeals (Westmoreland, Vesper & Schwartz, and Mr. Kitchenoff (Weinstem Kitchenoff Scarlato & Goldman), attorneys; R. C. Westmoreland and Mr. Kitchenoff, on the briefs).

Richard V. Jones argued the cause for respondent CNA Insurance Companies in A-4349-97T3 (Bressler, Amery & Ross, attorneys; Mr. Jones, on the brief).

Kevin T. Couglin argued the cause for respondent/cross-appellant Aetna Casualty and Surety Company in A-4689-97T5 (McElroy, Deutsch & Mulvaney, attorneys; Mr. Couglin, of counsel and on the brief; Vincent E. Reilly, on the brief).

The opinion of the court was delivered by CARCHMAN, J.A.D.

Chief Justice Charles Evans Hughes characterized questions of retroactivity "among the most difficult" issues addressed by courts, Chicot County Drainage Dist. V. Baxter State Bank, 308 U.S. 371, 374, 60 S. Ct. 317, 319, 84 L. Ed. 329, 333 (1940). Our Supreme Court acknowledged that "the passage of time and a maturing of retroactivity law have not rendered those issues any less vexatious." Coons v. American Honda Motor Co., 96 N.J. 419, 424-25 (1984), cert. denied, 469 U.S. 1123, 105 S. Ct. 808, 83 L. Ed. 2d 800 (1985). We now address

in the cases before us[1] the retroactivity of a judgment of the Chancery Division declaring that a workers' compensation lien established pursuant to N.J.S.A. 34:15-40 (Section 40) shall not include a respondent's portion of a petitioner's attorney and expert fees, an employer or insurer's expenses for a defense medical examination, or rehabilitative nursing service unless such nursing services "primarily benefitted the employee and were reasonably necessary to the injured employee's recovery." Judge Gibson determined, among the other issues presented, that in the Kuhnel case, the judgment would apply retroactively only to Kuhnel and those members of a class "who have not as of November 6, 1997, reached an agreement incorporated by a writing or release of any workers' compensation lien asserted by [defendant CNA Insurance Companies (CNA)]. In the Streeper case, the judge concluded that the judgment applies retroactively only to Streeper and those others similarly situated "for whom, as of November 6, 1997,[2] a defendant's lien under N.J.S.A. 34:15-40 was an open question by reason of the lien's not having been resolved by judgment or by an agreement." Except for the judgment for unjust enrichment against defendant in the Streeper case, we affirm and hold that the limited retroactivity of the judgments ordered by Judge Gibson represents an appropriate application of the factors enunciated by the New Jersey Supreme Court in Coons, supra, 96 N.J. at 425.

I

We briefly address the facts and procedural history as well as identify the other issues raised on this appeal.

A.

Plaintiff Diane Kuhnel was injured during the course of her employment with Western Medical Services (Western) on

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1 The cases have not been consolidated by are joined for the purposes of this opinion

2 The date of the trial court's opinion

September 5, 1990. She commenced a workers' compensation action against Western, and on September 22, 1993, the Division of Workers' Compensation (DWC), entered an order approving the settlement of that action. Kuhnel was awarded temporary disability benefits totaling $14,654 (September 6, 1990, to November 13, 1991). She was also found to be seventy percent totally and permanently disabled and awarded compensation totaling $58,094.65, after the applicable Social Security offset. Kuhnel's attorney was awarded counsel fees in the amount of $14,990, which were assessed at $5,995 against Kuhnel and $8,995 against Western. Various other fees and costs were also assessed against both parties.

Kuhnel subsequently commenced a third-party action arising out of the same circumstances, which was settled on September 23, 1994, for $420,000. On November 2, 1994, CNA claimed a total lien of $72,121.69 under Section 40, which included, among other things, the portions of Kuhnel's counsel fees and other fees and costs which were assessed against Western by the compensation court.

B.

Plaintiff James Streeper was injured during the course of his employment with Michael's Limousine, Inc. (Michael's), on October 9, 1998.[3] Streeper commenced a workers' compensation action against Michael's, and defendant Aetna Insurance Company (Aetna) provided Streeper certain benefits pursuant to Michael's workers' compensation insurance. After Streeper obtained a recovery from the tortfeasor in a third-party action, Aetna asserted a Section 40 lien of $25,335.37 for "medical payments" and "indemnity." Within the medical payments portion of the lien, Aetna included charges for a medical examination allegedly for the purpose of the workers'

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[3] Most of the background facts pertaining to Streeper and Gaitanos are derived from their amended complaint, as the record does not contain sufficient supporting documentation for verification.

compensation claim, as well as the charges for rehabilitative nursing services.

Plaintiff Anthony Gaitanos was injured during the course of his employment with Caesars Hotel & Casino (Caesar's) on June 14, 1991. Gaitanos subsequently commenced a workers' compensation action against Caesar's as a result of his injury, and Aetna provided Gaitanos with certain benefits pursuant to Caesar's workers' compensation insurance. After Gaitanos obtained a recovery in his third-party action, Aetna asserted a Section 40 lien of $47,962.52 for "medical payments" and "indemnity.' Within the total lien, Aetna included approximately $1,325 for medical examinations allegedly undertaken for Aetna for its defense of Gaitanos' workers' compensation claim.

Kuhnel filed a class action complaint on behalf of herself and all other similarly situated workers' compensation lien payers (collectively Kuhnel) against CNA and related companies alleging the following: Count One, violations of Section 40; Count Two, violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20; Count Three, fraudulent and negligent misrepresentation; Count Four, negligence per se; Count Five, breach of insurer's duty of good faith; and Count Six, unjust enrichment. Subsequently, Streeper filed a class action complaint against Aetna and any unknown affiliated workers' compensation insurers (collectively Aetna), alleging the same six counts as Kuhnel as well as a seventh count to reach Aetna's affiliates. In the Kuhnel action, CNA filed an answer and counterclaim, asserting fraud, equitable fraud and unjust enrichment.

After various amendments to the complaints to join additional related parties, CNA and Aetna filed motions to transfer the maters from the Chancery Division to the DWC. Judge Gibson entered an order granting CNA's motion "only as to the issue of whether [CNA's] portion of [Kuhnel's counsel] fees and [CNA's] portion of [Kuhnel's] expert fee [are] properly chargeable as a portion of the lien pursuant to N.J.S.A. 34:15-40

against the third-party recovery in favor of [Kuhnel]." All other issues remained before the Chancery Division. A similar transfer of the first count of Streeper's complaint (violation of Section 40) to the DWC was ordered.

Judge Gibson entered an order granting Kuhnel's motion for class certification. The certified class was defined as follows: "All workers on whose behalf a payment was or will be made to satisfy a workers' compensation lien asserted by [CNA], which lien included or includes [counsel] fees, expert fees or other administrative costs and expenses." No members of the class have been formally notified of the pendency of this action. See R. 4:32-2(b).

After a hearing in the DWC on the remanded issues, the DWC concluded that CNA's portion of Kuhnel's counsel and expert fees were not properly chargeable as a portion of the lien pursuant to Section 40. In the Streeper case, the DWC similarly concluded that Aetna's medical examination for the workers' compensation claim (independent medical examination or "IME") and the costs for rehabilitative nurses services were not lienable under Section 40.

On defendant's motions, Judge Gibson entered an order dismissing the consumer fraud counts of both Kuhnel's and Streeper's complaints for failure to state a claim upon which relief can be granted, R. 4:6-2(e). After considering cross-motions for summary judgment on the various remaining counts of the complaints, Judge Gibson held in Kuhnel:

> That the lien asserted by an employer or its workers' compensation insurance carrier in a workers' compensation matter pursuant to N.J.S.A. 34:15-40 against any recovery in a third-party action shall consist only of medical expenses incurred and compensation paid, and said compensation shall not include the

> respondent's portion of the petitioner's attorneys' fees nor the respondent's portion of the petitioner's experts' fees.

And in Streeper:

> (a) A lien pursuant to N.J.S.A. 34:15-40 may not include an employer's or its insurance carrier's expenses for a defense medical examination because such an examination is not a medical expense but is primarily for the benefit of the employer/insurance carrier and would not be reasonably necessary to the injured employee's recovery; and
>
> (b) A lien pursuant to N.J.S.A. 34:15-40 shall not include an employer's or its insurance carrier's expenses for so-called rehabilitative nursing services as a medical expense unless based on the facts of the case it can be shown that the service primarily benefitted the employee and was reasonably necessary to the injured employee's recovery.[4]

As to Kuhnel, Judge Gibson also entered an order which 1) dismissed CNA's counterclaims with prejudice; 2) granted summary judgment in favor of CNA on Count Three of Kuhnel's complaint (fraud and negligent misrepresentation); 3) granted judgment in favor of Kuhnel on Count One of her complaint (violation of Section 40); 4) granted judgment in favor of Kuhnel on Count Six of her complaint (unjust enrichment); 5) granted

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[4] Subsequent to the judgment in this case, we held that the proper standard to be applied was whether such rehabilitative nursing expenses are "necessary to cure and relieve claimant of the effects of the injury." Raso v. Ross Steel Erectors, Inc., 319 N.J. Super 373, 375 (App. Div. 1999).

judgment in favor of CNA dismissing Counts Four (negligence per se), Five (bad faith) and Seven (claims yet unknown against CNA) of Kuhnel's complaint; and 6) stated that the judgment entered shall apply retroactively only to Kuhnel and those members of the class "who have not as of November 6, 1997, reached an agreement incorporated by a writing or release of any workers' compensation lien asserted by [CNA]"

As to Streeper, Judge Gibson entered an order which 1) provided that the declaratory judgment applies retroactively only to Streeper and those others similarly situated "for whom, as of November 6, 1997, a defendant's lien under N.J.S.A. 34:15-40 was an open question by reason of the lien's not having been resolved by judgment or by an agreement;" 2) granted judgment in favor of Streeper as to County One and reduced Aetna's lien accordingly; 3) granted judgment in favor of Streeper on Count Six (unjust enrichment); 4) granted judgment in favor of Aetna dismissing Counts Three (fraud and negligent misrepresentation), Four (negligence per se), Five (bad faith) and Seven (Claims against unknown affiliates of Aetna); and 5) denied Streeper's motion for class certification as moot.

Plaintiffs appeal and Aetna cross-appeals.

II.

While Aetna raises an issue as to the whether certain expenses fall within the scope of the trail judge's order, no parties challenge the merits of the declaratory judgment or Judge Gibson's interpretation of Section 40. Plaintiffs, however, challenge the trial judge's determination that the declaratory judgments apply retroactively only to the named plaintiffs and those other claimants whose Section 40 liens remained "open questions," i.e., not resolved by either judgment or agreement, as of November 6, 1997, the date of the oral decision. The rulings were to apply prospectively to all others. Specifically, plaintiffs assert that the decision should be given complete retroactive

application to all parties, even those whose bases were settled or adjudicated and judgments entered, because 1) the rulings present no "new rule of law;" 2) CNA and Aetna failed to demonstrate any reasonable basis for reliance on "their self-serving interpretation of Section 40;" and 3) retroactive application of the ruling would not be unjust.

When confronted with an issue of retroactive or prospective application, a court may choose from four possible common law options:

> (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted.
>
> [Coons, supra, 96 N.J. at 425 (quoting State v. Burstein, 85 N.J. 394, 402-03 (1981)).]

Ultimately, the election of which approach to follow depends largely on "the court's view of what is just and consonant with public policy in the particular situation presented." Ibid. (quoting State v. Nash, 64 N.J. 464, 469 (1974)). Nevertheless, it is well recognized that retroactivity is the traditional rule in such cases, State v. Brimage, 153 N.J. 1, 26 (1998) (citing Coons, supra, 96 N.J. at 425), but such retroactivity is not unlimited. Therefore, "sound policy reasons" may persuade a court to limit

the retroactive effect of a ruling by according it only prospective application. These "sound reasons" are as follows:

> (1) justifiable reliance by the parties and the community as a whole on prior decisions, (2) a determination that the purpose of the new rule will not be advanced by retroactive application, and (3) a potentially adverse effect retrospectivity may have on the administration of justice.
>
> [Brimage, supra, 153 N.J. at 26 (citing Coons, supra, 96 N.J. at 426).]

In limiting retroactivity, Judge Gibson relied heavily on the third prong enunciated in Brimage. He noted:

> The problem with the kind of retroactive application that the plaintiff seeks here is the impact that it would have, or potentially have, on all the cases which have been resolved, I mean cases that went to judgment or where releases were executed by the parties and where closure occurred. To disturb all of those hundreds or thousands of cases that could potentially be impacted by a ruling that went back six years would be dramatic, so the Court has to ask itself, what is there about this case that would motivate the Court to take such, I'll say, [a] drastic approach to the resolution of this problem? If there was some egregious conduct, as these complaints suggested, it seems to me that that might be incentive for disturbing, and probably would be incentive for disturbing these prior cases, but I haven't found that in these cases. There was no definitive guidance out there for CNA or Aetna in 1994 or three or two or one or before that, that would have told them, with any

kind of clarity, that these charges were improper, but it does persuaded me that their actions would not be, in any way, purposefully wrong or fraudulent or egregious or any of the other labels that might warrant a sweeping kind of conclusion that the plaintiffs have suggested here. And in terms of the impact on the administration of justice, it seems to me that the impact would be significant and negative.

I am satisfied that, given the absence of intentional wrongdoing, given the absence of guidelines, given the very murky language of the Workers' Compensation Act, there is nothing here to convince me that the Court should reach further than is necessary to implement this ruling. So it is my conclusion that the rulings that I've made should apply retroactively to this extent only, they should apply to the current plaintiffs because I believe that the current plaintiffs deserve the benefits of this ruling given the investment that they made. And I believe that this ruling should also apply to any other plaintiffs similarly situated who have not yet gone to judgment or reached an agreement incorporated by a writing or release. Stated differently, to the extent that there are pending cases out there for which the lienability of these items is still an open question, this ruling would apply and would bind CNA and would bind Aetna. Beyond that, the ruling would simply apply prospectively. That is the ruling of the Court.

Even assuming that the application of Section 40 presents no "new rule of law" or that defendants failed demonstrate a reasonable basis for reliance on their interpretation of Section 40,

we agree with Judge Gibson's analysis and suggest that the impact of such an application "on the administration of justice" is dispositive.

As a general rule, third-party actions which give use to lien recovery are matters which have, at some state, been involved in the litigation process - an action was either threatened, commenced or fully litigated. In the overwhelming majority of these cases, plaintiffs were represented by counsel who either accepted the liens without question or negotiated the liens considering, among other things, the quantum of recovery in the third-party action, the amount of the lien and the willingness of the carrier to compromise. To suggest that these matters can or should be "undone" suggest a process that, on balance, will be more disruptive than productive.

We neither disregard nor minimize plaintiffs' arguments that this result allows the carriers to retain "ill-gotten" funds. Yet in the context of litigated proceedings, where attorneys were able to challenge the lien and its components, but chose not to, we are not persuaded that this argument prevails over the imposition on the court and litigants of the reopening of potential thousands of proceedings that have long since been resolved. This invites chaos, a result that we are not willing to sanction. Judge Gibson's limited retroactivity represents an appropriate balance of the competing interests, and we concur in that result.[5]

III.

Kuhnel and Streeper argue that there was a sufficient showing of facts to support a claim of fraud and misrepresentation and defeat a motion for summary judgment. Additionally, they claim that Judge Gibson erred by dismissing the consumer fraud

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[5] We also again note that in Kuhnel the class action was never perfected by notice, and in Streeper, the class was never certified. Our holding in this case renders moot any further action in reference to the class issues.

count. Defendants argue that the court erred in granting declaratory relief and summary judgment as to unjust enrichment.

Common law fraud consists of "a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely [on the misstatement], resulting in reliance by that party to his detriment." United Jersey Bank v. Kensey, 306 N.J. Super. 540, 550 (App. Div. 1997) (alteration in original) (citations omitted), certif. Denied, 153 N.J. 402 (1998). Negligent misrepresentation, on the other hand, requires proof that an "incorrect statement was negligently made and justifiably relied upon" and that injury was sustained as a consequence of that reliance. Carroll v. Cellco Partnership, 313 N.J. Super. 488, 502 (App.Div. 1998).

Here, Judge Gibson found that plaintiffs proffered no competent evidence raising a factual question as to whether defendants knew the lien charges were inappropriate yet asserted them anyway. Similarly, he concluded that the lien expenses were not negligently asserted since there were no clear guidelines predating the cases which suggested that the charges were improper. Additionally, as to both allegations, the judge noted that plaintiffs made no showing of detrimental reliance, as they contested the lienability of the charges and held the money in escrow rather than remit it to defendants. We agree with both his analysis and conclusion as to these issues.

Judge Gibson further concluded that there was no showing of sufficient facts to warrant application of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (CFA). On appeal, plaintiffs rely on Lemelledo v. Beneficial Management Corp. of America, 150 N.J. 255, 263 (1997), a reliance that we find is misplaced. Plaintiffs' claims pertain strictly to defendants' interpretation of the workers' compensation statutes and do not implicate the marketing or sale of the policies to their employers by the carriers. The issues here involve the receipt of benefits, issues which have been held to be beyond the scope of the CFA. See Nikiper v.

Motor Club of Am. Cos., 40, 46 (App. Div.), certif. denied, 104 N.J. 399 (1986).

IV.

In Streeper, the parties stipulated to a judgment against Aetna on Count VI of the complaint alleging unjust enrichment. The stipulation further provided: "[t] he agreement to resolve these claims by stipulation . . . shall not be deemed a waiver of any argument any party has in opposition to the stipulated outcome and is understood not to affect the appealablity of any issues so decided:

The parties agreed to hold the disputed portions of the lien due from plaintiffs in escrow pending the resolution of this action, and plaintiffs' attorneys were designated as escrow agent.

No monies were received by Aetna nor any benefit or payment that could be considered unjust. See VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994); Caputo v. Nice-Pak Products, Inc., 300 N. J. Super. 498, 507 (App. Div.) certif. den. 151 N.J. 463 (1997); Associated Command Corp. v. Wallia, 211 N.J. Super. 243 (App. Div. 1986). There was no basis for the entry of a judgment against Aetna for unjust enrichment nor do plaintiffs, in their appellate filings, suggest any such basis. Accordingly, we reverse the judgment against Aetna on Count VI of the Streeper complaint and dismiss that count. Any release of escrow was properly premised on the declaratory judgment in plaintiffs' favor.

We have carefully considered all of the remaining arguments as to the issues raised by the parties on this appeal. We conclude that they are without merit, R. 2:11-3(e) (1) (E), and we affirm substantially for the reasons set forth in Judge Gibson's comprehensive and thoughtful oral opinion on November 6, 1997.

The judgment entered in favor of plaintiffs as to Count VI of the Streeper complaint (A-4689-97T5) is reversed. In all other respects the judgment in both A-4349-97T3 and A-4689-97T5 is affirmed.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
ATLANTIC COUNTY
DOCKET NO. C-184-94

DIANE KUHNEL,	:
	:
PLAINTIFF,	:
	:
vs.	:TRANSCRIPT OF DECISION
CNA INSURANCE	:
COMPANIES,	:
	:
DEFENDANT.	:
AND	:
	:SUPERIOR COURT OF NEW
JAMES STREEPER	:JERSEY
	:CHANCERY DIVISION
PLAINTIFF	:ATLANTIC COUNTY
	:DOCKET NO. C-15-95
vs.	:
AETNA INSURANCE	:
COMPANY,	:
	:
DEFENDANT	:
	:

PLACE: ATLANTIC COUNTY
COURTHOUSE
1201 BACHARACH BLVD.
ATLANTIC CITY, NJ 08401
DATE: THURSDAY, NOVEMBER 6, 1997

B E F O R E:

THE HONORABLE L. ANTHONY GIBSON, JSC

KATHY E. DURAND, CSR, CM

OFFICIAL COURT REPORTER
ATLANTIC COUNTY
COURTHOUSE
1201 BACHARACH BLVD.
ATLANTIC CITY, NJ 08401

ORDERED BY:

THOMAS VESPER, ESQ. (McAllister, Westmoreland, Vesper, Schwartz, Hyberg & White)

APPEARANCES:

ROBERT S. KITCHENOFF, ESQ. (Weinstein, Kitchenoff, Scarlato & Goldman)
ATTORNEY FOR PLAINTIFF KUHNEL & STREEPER

VINCENT E. REILLY, ESQ. (McElroy, Deutsch & Mulvaney)
ATTORNEY FOR DEFENDANT AETNA

RICHARD B. JONES, ESQ. (Bressler, Amery & Ross)
ATTORNEY FOR DEFENDANT CNA

(Decision)

THE COURT: There are two matters before the Court this afternoon, one is Kuhnel vs. CNA, the other is Streeper vs. Aetna, and I'd like to have the appearances of counsel in each case, beginning with Mr. Kitchenoff.

MR. KITCHENOFF: Good afternoon, Your Honor. Robert Kitchenoff, Weinstein, Kitchenoff, Scarlato and Goldman, and I represent the plaintiff in the Kuhnel case and the plaintiff in the Streeper vs. Aetna case.

MR. JONES: Richard B. Jones, Bressler, Amery and Ross, representing CNA Insurance Company.

MR. REILLY: Vincent E. Reilly, McElroy, Deutsch and Mulvaney on behalf of Aetna in the Streeper matter, Your Honor.

THE COURT: Thank you. These cases are before me today for purposes of the Court rendering a decision with respect to a variety of outstanding motions that were previously argued in both cases. I intend to begin by describing the nature of these actions and the procedural setting which places them before the Court. I will then go on to recite the factual findings that I believe are appropriate given the proofs before me, and then ultimately identify the legal issues and my reaction to them.

These cases are declaratory judgment actions in which each of the plaintiffs seek a determination by the Court whereby I would conclude that the insurance carriers, that is, the workers compensation carriers for these plaintiffs wrongfully overstated the extent of the workers compensation lien that arose out of the on-the-job injury. What plaintiffs seek is a declaratory judgment with respect to the lienability of these items and ultimately an award of damages and injunctive relief.

In both complaints the plaintiffs seek to act as a

representative of a class, and in the Kuhnel case there has already been a motion certifying the class. Although these cases have not been consolidated I have elected to treat these motions concurrently, because it was my view that the ruling by the Court in the one case would most likely have a significant effect on the Court's reaction to the issues in the second case. As a result, it was my judgment that in order to fairly treat all the parties it would be best that I consider these motions together.

The specific motions before the Court are as follows. In the Kuhnel case there is a motion for summary judgment with respect to the declaratory judgment aspects of the case. There is also a motion by the plaintiffs seeking a dismissal of the counterclaims by the defendant. The third motion in the Kuhnel case is the defendant's motion seeking summary judgment with respect to count three of the complaint, which is the count dealing with fraud and/or negligence.

In the Streeper case there are cross motions with respect to the declaratory judgment count, that is, the plaintiff seeks a judgment by the Court with respect to the declaratory judgment portion of the complaint and the defendant seeks a dismissal of that portion of the complaint.

The docket numbers in these cases are as follows. Kuhnel is ATL-C-184-94, the Streeper case is ATL-C-15-95.

Elaborating a bit further with respect to the procedural history, as I've already indicated, these cases were initiated by each of these plaintiffs with intent to assert not only rights on behalf of themselves but with respect to others.

There was a third case that was treated as part of this motion that was the --strike that. There was a third case in which the Court was asked to transfer the declaratory judgment aspects of these cases to the Division of Workers Compensation, and that was a case known as Raso vs. Harleysville. The Court did grant

those motions and thereby transferred the declaratory judgment portion of those three cases to the Division of Workers Compensation, and I will describe the results of that step in a moment.

Let me indicate briefly, however, that the Raso case was subsequently dismissed on motion, although it had already gone to the Worker Compensation court and a decision was rendered with regard to that by Judge Munyon. The Kuhnel case was heard by Judge Fred Kumpf, and in the that case Judge Kumpf ruled that the contested items with respect to lienability, that is, the defendant's challenge to having to pay the petitioner's portion of the petitioner's counselor's fees and the petitioner's — I'm sorry, the respondent's portion of the petitioner's expert's fees was placed in issue. I said the challenge of the defendant, I really meant the challenge of the plaintiffs. It was the plaintiff's position that those charges were no lienable and Judge Kumpf agreed, and the reasoning of his decision is set forth in a transcript dated February 13th, 1996.

In the Streeper case the issues were the lienability of a medical exam by Doctor Cavalier who was retained by the respondent, and also the lienability of so-called rehabilitative nursing serves. Judge Matthew Parks, sitting in the Workers Compensation Division, heard those challenges, and following a hearing there determined that both of those charges were not lienable. His decision is outlined in a transcript dated April 2nd, 1996.

The third case, which I mentioned earlier as having been dismissed, the Raso case, was heard by Judge Munyon, and he also dealt with the issue of rehabilitative nursing services. The exact title of the lien is somewhat different there, but I believe it was referred to as rehabilitation consultation case management services. He found that those services were, in fact, lienable and represented a medical benefit. His decision is incorporated into a transcript dated December 12th, 1996 and an order was entered by

him as a result of that ruling. Following the most recent argument on these motions the Court reserved decision. Let me now proceed to the factual background.

I'll begin by indicating that, to a large extent, the factual background is not disputed with a rather significant exception which I'll deal with in a few moments. With respect to the facts in each case, that is, the Kuhnel case and in the Streeper case, I would incorporate by reference the factual conclusions that were made by the Workers Compensation Judges in each of those instances. In summary, however, I will note that in both cases the plaintiff was injured on the job and sought medical payments and compensation benefits from his or her employer. In each case there were such payments. In each case there was a later third party claim that was successfully prosecuted by the injured employee, and in each instance, the carrier asserted a workers compensation lien under Section 40 of the Worker Compensation Act. For the most part, those liens were not the subject of dispute, but with respect to certain particulars they were, and I've already mentioned them.

As I said earlier, in Streeper it was the defense medical exam and the so-called rehabilitative nursing serves. In Kuhnel, it was the payment by the carrier of its portion of the petitioner's attorney's fees and expert fees. In each case the attorney for the petitioner/third party claimant contested these items and refused to pay that portion of the lien to the carrier, and instead, placed the disputed funds in escrow where they still remain.

In addition to the facts surrounding the charges themselves as they have been recited by Judge Kumpf and by Judge Parks, it's also important to recognize that these cases also include factual claims by the plaintiff regarding the conduct of the carriers, and in each instance the plaintiffs claim that the carriers acted fraudulently and/or negligently in connection with the assertion of these lien claims. Stated differently, the plaintiff in each case claims that not only were these charges wrongful but

that the carriers knew they were wrongful and intentionally charged them to the detriment of the plaintiffs and others.

With respect to that particular factual claim, I do not believe that there is competent evidence to support it. It isn't enough, for example, to simply claim that there was an error and that it was repeated, or even to assert that one of the employees or officers of the carrier conceded that there was no firm or consistent policy on this issue. None of that, in my judgment, either establishes fraud or even creates a factual issue with respect to fraud. So my factual findings do not include a finding of fraud for purposes of what's to follow.

There is, as well, a negligence claim, but frankly, I don't see how the negligence claim adds anything to this case for purposes of what it is the Court is being asked to conclude, and by that I mean that if, in fact, I conclude that these charges were improper, I don't believe that calling it negligence to have included them, changes the dynamics of this case. And I do believe that these charges were, in fact, improper, as I will explain as I go through my legal conclusions.

The legal issues are as follows. Number one, does the Court have jurisdiction over the declaratory judgment issue, that is, the lienability question? This jurisdiction issue has two parts, one relating to the transfer by this Court to the Division and what impact that has on the continuing jurisdiction of the Court, and the second, which is whether this Court can exercise jurisdiction in general. On each of those questions my conclusion is going to be that this Court does have jurisdiction. The second question is whether the plaintiffs are or are not entitled to declaratory judgement, assuming the Court has jurisdiction, and for reasons that I'll be explaining, it is my conclusion that the answer to that is yes. The third question is, assuming the plaintiffs are entitled to declaratory judgments, how should it be framed, that is, how should the declaratory judgment be worded and to what extent — to what breadth should it be stated? The fourth issue is one

relating to the legitimacy of the attorney's fees and whether those attorney's fees should be calculated with respect to what is referred to as first dollars up to a limit of 33 1/3 percent or pursuant to the so-called blended rate which has been urged by the defendants, and it is my conclusion that the blended rate does not apply in either of these instances.

The next question, the next legal issue, that is, is whether the plaintiff Kuhnel has successfully demonstrated that it is entitled to summary judgment with respect to CNA's counterclaims. CNA's counterclaims include four counts. One is a fraud count based on the plaintiff's alleged overcharging of attorney's fees. The second is a fraud count bases on a prior attorney's miscalculation with respect to the lien. The third count is an equitable fraud count, but that's been abandoned. And the fourth count is an unjust enrichment count basically dealing with the same underpinnings of the plaintiff's factual claims for unjust enrichment. It is my conclusion that the plaintiff is entitled to summary judgment on each of the three of those remaining counts of the counterclaim.

The next issue, the sixth issue, is whether CNA is entitled to summary judgment on Kuhnel's fraud and/or negligence misrepresentation claim, that is, count three, and for reasons that I will be explaining, it is my judgment that CNA is entitled to summary judgment on that count.

The last issue is the question regarding how the Court's judgment should be applied, which is whether it should be applied retroactively or prospectively, and depending on the answer to that, what does that actually mean in this setting.

Let me now proceed to the reasoning that I have gone through in order to reach these conclusions on each of these issues. And I'll begin with the jurisdictional question. I don't remember exactly when, but relatively early in the litigation for each of these cases I was asked to transfer the declaratory

judgment portion, that is, the lienability question itself, to the Division, and I ultimately agreed, as the record in those cases will reflect, and my reasoning for doing so is on the record and will be incorporated here by reference. A question has arisen since that time, however, as to whether that transfer removed the lienability issue from this Court and made the ruling of the Division on this question final and thereby appealable directly. That issue had never been part of the Court's decision or the argument when these motions were first made, and frankly, it hadn't been considered by me. After the event was over and orders were submitted, as it turns out, the wording in the orders was somewhat different and generated this question as to jurisdiction. Without going through all of the details of that, let me simply indicated that it was never my intention to remove the question of lienability from the ultimate determination by this Court and I believe that this Court has jurisdiction over that question for reasons that I'll mention in a moment.

With respect to the substance of those rulings, that is, the lienability rulings, I have determined that the rulings made by Judge Parks and by Judge Kumpf were, in fact, correct, that is, I believe they reached the right result in each of those instances, and therefore, I intend to embrace their ruling. Now, having said that, it seems to me that this question of whether the Court has continuing jurisdiction over those issues for purposes of making an independent judgment or not is probably academic, but in an effort to make my ruling as complete as I can, I do intend to go through the analysis that I have made of those questions on a substantive level. So not only am I embracing the ruling on these issues and adopting them, I have made an independent judgment as well with respect to the same questions.

With respect to whether this Court has jurisdiction in general, motions to transfer aside, it is my belief that it does, and basically, I would adopt the reasoning of Judge McKenzie in the Aetna Life and Casualty case which was decided at 218 New Jersey Super 239.

It is significant that what is before me are two cases, both of which seek widespread and far reaching relief, and although the lienability issue is a critical component of that relief, it is not the only form of relief or the only basis for relief that these complaints sought. And in the first instance, in each of these cases there was a determination by the Division of Worker Compensation. So to the extent that the Statute requires jurisdiction before the Division under Section 49, I believe that that has been satisfied by what happened here, both initially and as a result of the motions that I granted. Specifically, Section 49 says that the Division of Worker Compensation shall have the exclusive original jurisdiction of all claims for worker compensation benefits under this chapter, but for the same reasons that Judge McKenzie adopted in Aetna, I believe that that does not remove from this Court's jurisdiction what it is that I have intended to rule on and what I am ruling on here today.

With respect to the second issue, that is, whether the plaintiffs are entitled to a declaratory judgment, as I indicated earlier, it is my conclusion that they are. The law with respect to declaratory judgments is not in dispute here, and both sides agree that declaratory judgments are designed to end uncertainty about the rights and duties of parties to litigation. And although the Courts will refrain from rendering what are referred to as advisory opinions and will, therefore, not function in the abstract, declaratory judgments and declaratory relief is appropriate when there's an actual dispute between parties and those parties have a sufficient stake in the outcome. In this case, I'm satisfied that all of those elements are present. It's true, as defense counsel points out, that the Court has discretion as to whether to render a declaratory judgment, but I'm satisfied that that discretion should be exercised in favor of granting the relief in this setting. I don't believe, for example, that there us abt real question that the parties have a genuine stake in the outcome of this case. I don't doubt, for example, that these issues impact significantly on the rights and duties of all the parties to these cases, and I don't think that this is, in any way, an issue presented in the abstract.

Having reached this conclusion, this will correspondingly decide the cross motion in Streeper which seeks summary judgment to the contrary, and that motion will be denied. I don't agree with the defense, for example, that the CRIB guidelines resolve this issue, and I'll elaborate on that further as I get into the merits of the lienability issue.

There is a significant separate question as to what the extent of this declaration should be. And the plaintiff has proposed certain wording for a declaration which I'm going to quote. By the way, the plaintiff's position is that there should be two parts to this declaration, the A part and the B part. For the moment I'm simply going to refer to the A part. "Section 40 of the Worker Compensation Act was enacted to prevent double recoveries and defendants could not recover items in a Section 40 lien that could not be awarded as damages in a third party action."

Before reacting to that particular proposal, let me begin the analysis of what I believe the Worker Compensation Act intends and means in this setting. And let me begin that analysis by reciting what I believe everyone agrees to, and that is that this issue, that is, the issue of whether these items are lienable, has never been decided by any reported decision in the State of New Jersey at any level. Stated differently, these are issues of first impression.

The so-called Section 40 lien arises in settings where an employee was injured on the job, received medical benefits and/or compensation payments from his or her employer, and then successfully pursued an action against the third party who was allegedly responsible for that same injury in whole or in part. If at any time prior to payment by the third party or his insurance carrier, the employer and/or the worker compensation carrier serves notice on the third party or the carrier, it is the duty of the third person or the carrier to reimburse the employer or the employer's carrier for the medical expenses incurred and the compensation payments previously made, less the employee's

expenses of suit and attorney's fees. All that can be found in NJSA 34:15-40, subsection (b) and (d).

In section (b) the statute speaks in terms of a setting in which the recovery in the third party action is either equivalent to or greater than the compensation paid, and since this is the most critical portion of the statute for purpose of what the Court has to decide, I'm going to quote the (b) section in full. "If the sum received by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier shall be released from such liability and shall be entitled to reimbursed as hereinafter provided for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependent, less employee's expenses of suit and attorney's fees as hereinafter defined."

As I've already mentioned, despite the seeming simplicity of that language, the issues that it creates are significant, and unfortunately, there are no cases out there that resolve these issues. Nor does the statute itself explain or define what "medical expenses incurred in compensation payments thertofore paid" means. To make things somewhat worse, there are relatively few cases out there that deal with lienability at all. Nevertheless, the Court doesn't begin this process with a clean slate. There are, for example, a number of things that do help, I think, in reaching a judgment about all of this, and I will mention them.

We know, for example, that the underlying philosophy or policy behind the Section 40 lien is the so-called no double recovery rule. In accordance with that rule, an employee will be guaranteed recovery for his or her common law damages against a contributing third party tort feasor, but he or she may no duplicate those recoveries. Authority for that proposition can be found in a number of cases, but most recently in Frazier vs. New Jersey Manufacturers Insurance, 142 New Jersey 590, a 1995 Supreme Court decision. Under the no double recovery rule, for every

dollar of the employee's recovery from the third party, the carrier's lien under Section 40 entitles it to reimbursement for that dollar, less legal costs for every dollar received as a result of the recovery. The intention, obviously, is to prevent a duplication of benefit for the same injury. That rule, however, is itself not only not dispositive, but creates some confusion as well, because as we later learn in some of the cases that have been decided, the match up between the benefits available under Section 40, on the one hand, and those that are lienable do not necessarily have to match the recovery that is made in the third party action for purposes of reimbursement. And the Bello case sets that forth very strongly. So although we begin with the no double recovery rule, it doesn't close the circle for us.

We also know that there is no full compensation under the statute. By that I mean, and by that the cases mean that when a plaintiff recovers from a third party, the lien attaches regardless of whether the cumulative awards are sufficient to fully compensate the injured employee for all injures. Thus, the employee is required to reimburse the comp carrier for the amount received from the third party tortfeasor without regards to whether or not the employee is fully compensated for his or her injuries.

Finally, we know, as another guideline for this puzzle, we know that the Workers Compensation Act is to be liberally construed so as to alleviate the consequences of injures to workers on the job, and to place the burden for relieving those consequences on the industry itself. And support for that can be found in the Squeo, Squeo vs. Comfort Control Corporation.

So we have these principles out there which are important but difficult to apply when it comes to questions of lienability. I think, however, it's safe to say that although there is now a statutorily codified policy against double recovery, the overall impact of the Act is one which requires a liberal construction so as to alleviate the downside of industrial accidents. I think that liberal construction has an impact on close questions as to what is

lienable and I think that it also has an impact on close questions regarding what is and what is not a legitimate benefit and/or obligation on the part of the carrier, that is, benefit to the employee and obligation on the part of the employer or the employer's carrier.

Although the statute doesn't answer the question as to lienability, and although the case law doesn't answer the question on lienability, at least with respect to these items, there is some additional guidance in the statute in that Section 15 defines what is referred to as medical expenses, that is, medical expenses for which the employee is to be reimbursed or to have paid directly, and that statute speaks in terms of, quote, "medical, surgical or other treatment and hospital services as shall be necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member organ where such restoration is possible." End of quote. Actually, as I look at my notes, although I was quoting there, there were some words that I left out of that quote because I thought it would further confuse an already confusing message.

Later in the same section, the Act speaks in terms of a determination by the Division where there is a contest as to what treatment and services are considered necessary and what fees are deemed to be reasonable. Similar language is found in Section 23 of the Act where the Act reacts to circumstances contemplated where an employee may refuse to accept proffered medical and surgical treatment. So I think the Act does help us to some extent in terms of what would be considered medical treatment for purposes of determining what is lienable, and I think that the language that speaks in terms of what is necessary and reasonable is important and helpful. It is significant that disputes will obviously arise in those areas and that those disputes are generally referred to the Division for resolution. That language, however, only deals with the question of medical. The doesn't deal with what is contemplated by the word compensation, and as we know, Section 40 deals with both medical treatment and compensation.

The search for what is meant by compensation is a search which is even more frustrating than the one dealing with the term medical, but again, there is some guidance out there. There is the Harper case, for example. There is the O'Brien case and the Houlihan case that, as I say, are helpful in these areas.

Compensation can mean different things in different settings. That appears to be recognized and clear. It also appears to be the case that the term may not always be used consistently even within the Act itself, so what may be compensation for rating purposes is not necessarily compensation for lien purposes. I mentioned the Harper case before because the Harper case is one of the few instances where we get some guidance as to what the alternatives are, and in the Harper case there was a discussion with respect to an equating of compensation with earning power, and accordingly, we do get some guidance from those comparisons.

Before I deal with that further, though, let me develop the analysis on a somewhat different tact, and that is to recognize that, regardless of what questions may come up under the definition of what is medical and what is compensation, we do know that not all monies paid or benefits paid, if you will, necessarily equate to a right to reimbursement, as Judge Kumpf pointed out in his decision when addressing the same question, We know, for example, that, and Judge Kumpf highlighted this, that in a double compensation award case where there is a penalty under Section 10, there is no entitlement on the part of the carrier to retrieve, despite a third party recovery, that double portion of the aware. Nor is the carrier's reimbursement of a third party counsel fee considered compensation under Section 40, and that authority can be found in Fiore vs. Trident. The ruling in that case deals with the double recovery situation. It has also been held that burial and funeral expenses paid by an employer or its carrier pursuant to Section 13 (h) are not considered compensation for purposes of this Section 40 lien, and that 's the O'Brien decision.

Speaking of O'Brien and Houlihan, both of those cases came under scrutiny by our Supreme Court in the Bello case in 1970, and each of those decisions was disapproved in part with respect to that aspect of the decision relating to the matching of benefits. I don't take it from that ruling in Bello, however, that the fundamental holding either in Houlihan or in O'Brien was disapproved. Indeed, there is no language in Bello to suggest that. So I believe that Houlihan and O'Brien are still persuasive and good law with respect to the results they reached, although not al the reasoning that was utilized is any longer the law. What was disapproved as the notion that a carrier's entitlement to the reimbursement is limited to only those items that an employee is entitled to recover against a third party. That particular part of the Bello holding can be found at page 45.

Bello also pointed out, however, that that part of the Houlihan ruling was not necessary to the Court's reasoning and, therefore, the reasoning could stand without it. I believe the same is true in O'Brien. Judge McKenzie pointed out another example of a situation in which benefits paid would not be lienable, and although that was not a lien case, his analysis, I think, is on target and I find it persuasive, and that was the Aetna Life and Casualty case.

So we know from those cases, or we have examples from those cases of several instances, or at least a few instances in which we learn that simply because benefits were paid does not necessarily mean that those payments are reimbursable under Section 40. So now we know that there is no double recovery rule, we know that not all benefits that are paid by way of comp benefits are necessarily lienable. We know as well that the Act is to be liberally construed in favor of the recovery of the petitioner. We know as well that the cases tell us that all of these provisions in the Comp Act are designed to integrate the recovery process. I believe with the ultimate intent to fully compensate the petitioner when possible, even though there is no rule that requires full recovery.

Now, let me return to Harper for a minute, because I think it dovetails into O'Brien and Houlihan here in helping to resolve the question as to whether theses challenged expenses here should be considered lienable, I believe that Judge Kumpf and Judge Parks reached the result that I believe is appropriate under these circumstances, and although Judge Parks was not as detailed as Judge Kumpf and, therefore, we don't know as much about his thinking process, I do think there is enough in there to support the conclusion that he reached factually and then legally, because I'm also persuaded that the most pertinent interpretation of compensation comes from Harper and that such an interpretation leads to the conclusion that there is a direct connection or relationship between compensation and earning power. It seems to me that the most logical application of that connection is to conclude that compensation is intended to relate to disability benefits, whether they are permanent disability or temporary disability, because it seems to me that disability is the most closely equivalent dynamic of the compensation benefit and the notion of compensation in the Act generally.

I recognize, as the defendants point out, that the word compensation itself is certainly broad enough to include al of this. It's broad enough to include, for example, funeral benefits. It's broad enough to include double recovery, it's broad enough to include all the things that have been rejected by the case law that I've just mentioned. But the fact that such a broad reading has been rejected in all of those cases convinces me that such a broad definition here would be inappropriate. Conversely, it is my judgment that the most appropriate definition in this setting is to deal with those benefits that relate to earning power and the disability category that I just mentioned.

Finally, as I complete this analysis, I'm influenced by the fact that it is my judgment, although this is not explicit in the Act, it is my judgment that it is unlikely that the Legislature would have intended a result that would deplete the petitioner's third party recovery beyond that which is explicitly required. In other

words, since the Section 40 addition to this Act actually took away benefits that were otherwise available under the Act, it seems to me that that section should not be read too broadly, or more broadly than I think would be plain under the circumstances.

Now, how does all that relate to the particular expenses that have been challenged here? For example, what does this tell us in terms of the ability of a carrier to obtain reimbursement for that part of the petitioner's worker compensation award that required the respondent to pay a portion of the petitioner's attorney's fees and a portion of the petitioner's expert fees. In addition, how does all this help us in terms of deciding whether doctor Cavalier's exam, the so-called defense exam, is something that is includable and how does it help us in terms of deciding whether the so-called rehabilitative nursing services are lienable? I think these cases and the interpretation that I've given to the statute generally supports the conclusion that I have reached and that Judge Parks and Judge Kumpf reached, and that is that defense costs, in general, are not lienable. That is, the costs of litigation and the costs relating to the distribution of the benefits themselves are simply the responsibility of the carrier. I do not believe that such costs can be considered compensation as I have interpreted that language and as I believe the cases help us understand. That decides the issues in the Streeper declaratory judgment count. I say Streeper, I meant Kuhnel.

With respect to Streeper, my conclusion is the same, but for a slightly different reason, because although the same reasoning applies to Doctor Cavalier's exam because it was a defense exam designed to assist the carrier in determining what benefits it would pay or not pay, as opposed to being intended to provide treatment to the petitioner, it is not compensation and, therefore, not reimbursable.

There has been a dispute in this case as a result of the decisions made by the two worker compensation judges that I

mentioned as to what is the guiding determination on this issue - aside from simply saying that it's not compensation. One of the potential answers was whether this service was a benefit to the petitioner, and it is the defense position that if it was a benefit it should be qualified as compensation or medical, and thereby reimbursable. The plaintiff argued against that position and believes that that label benefit, that is, the word benefit, is too subjective and, therefore, not helpful. My own position is that the term benefit is helpful but not dispositive. I think it is helpful, for example, to make a determination as to whether a particular medical exam was designed for the primary benefit of the petitioner as opposed to the respondent, and if the exam primarily benefits, or was intended to benefit the petitioner and is medically necessary, then it seems to me that such an exam would be lienable. I'm well satisfied that the exam in this case doesn't fall into such a category.

The rehabilitative nursing services require a little bit of a different analysis, although I still believe we are talking about whether they qualify as medical treatment or not. Although the Raso case is no longer before me, I am aware that Judge Munyon, in a rather thorough opinion, I believe, that he rendered found that the rehabilitative nursing services in that case were, in fact, legitimate medical expenses, but I believe that the Raso case was an unusual and unique case based on what I see as the landscape here. In Raso, there were certain emotional and mental problems that were part of the injury that handicapped the petitioner from obtaining regular medical treatment, taking medication and doing other things that were necessary to the recovery. In such a setting, Judge Munyon concluded, and the medical testimony supported this, that such treatment was, in fact, legitimate, and he said beneficial to the petitioner.

So it is conceivable to me that there will be instances in which so-called nursing services or rehabilitative nursing services may actually fall within the category of, medical treatments as contemplated by the statute and therefore medical expenses would

be reimbursable. But recognizing that as a potential is a far cry from concluding that all rehabilitative nursing services are lienable, or even that most are. Indeed, my assumption would be that most are not. It would appear in this instance, for example, that is the Streeper case, that the nursing services were not really medical services at all, that they were simply services for purposes of monitoring the condition of the petitioner for purposes of minimizing the expenses that the carrier would have to incur in terms of the benefits to be paid. Such a service is not, in my judgment, a medical service, even though it is being performed by a medical professional. So with respect to nursing services, it would be my view that such services would not be lienable unless they primarily benefitted the petitioner and are reasonably necessary medically.

Now, I recognize that, having said that, there may still be disputes and probably will be disputes with respect to whether those criteria are followed. And yet I don't believe that, given the fact sensitive nature of many of the services that are potentially available, the Court can necessarily give a bright line guideline for every case. I might not parenthetically that even it I were to limit my ruling to an adoption of the so-called benefit theory, I would still not have concluded other than I have. In other words, it's my view that the facts in this case do not support the defendant's position, that either the Cavalier exam or the rehabilitative nursing services primarily benefitted Mr. Streeper, and I adopt the facts assumed and concluded by Judge Parks in that regard. In sum, it is my judgment that the defense share of the costs in Kuhnel and the medical exam and the rehabilitative nursing services in Streeper were both outside of the permissible lienability items under Section 40 of the Worker Compensation Act.

With respect to what this court's declaration should be, I find that the requested language by the plaintiff should be rejected. It is my conclusion that the language that the plaintiff sought for each of these cases was too broad and partially

inaccurate. For example, although I agree with the plaintiffs that Section 40 was enacted to prevent double recovery, I do not agree with the remainder of plaintiff's language. The remainder of the language in the proposed declaration, I believe, was rejected by our Supreme Court in Bello.

What I affirmatively believe and what I have concluded and what will be part of this court's declaration is that a Section 40 lien may not include an employer's or a worker compensation carrier's expenses of suit, such as its share of the petitioner's attorney's fees or its share of the petitioner's expert fees, and my reasoning is that they are not includable because they are not compensation, as I've interpreted it. It's also my declaration that a Section 40 lien may not include a defense medical exam since such an exam is primarily for the benefit of the carrier and would not be reasonably necessary to the injured employee's recovery. Finally, I would declare that any determination as to whether so called rehabilitative nursing services constitute a legitimate medical expense by a comp carrier is fact sensitive, but would not be reimbursable unless the service primarily benefitted the employee and is reasonably necessary to the injured employee's recovery.

The next question is number four, and that is how are defendant's share of the plaintiff's attorney's fees in the third party action to be calculated? This particular part of the motions was not very thoroughly briefed. It was, as a matter of fact, very thinly briefed, but given the age of those cases and the length of time that these motions have been pending, I have done my best to research this question so that I could resolve it as part of this motion rather than requiring further briefing on the subject. And my analysis is as follows. Pursuant to Section 40 an employer or the plaintiff's carrier is entitled for reimbursement of, quote, and that also requires a deduction of the employee's expenses of suit and attorney's fees as expenses not in excess of $200.00, so that's not a problem, and that can be found in subsection (e).

Attorney's fees are defined as such fees not in excess of 33 1/3 percent of that part of the sum paid in release or in judgment to the injured employee or his dependent by such third person or his insurance carrier. In the Pagan case, which was an Appellate Division case back in 1976, it was explained that Section 40 required the compensation carrier to bear its pro rata share of the attorney's fees sought or paid by the injured employee in the third party claim with an upper limited of 33 1/3 percent. The Court later explained that a corollary consequence of that rule is that the fee ration may not exceed that which was actually borne by the injured employee, and ultimately that is controlled by one of our Court rules, Rule 1:21-7.

There are other cases that were helpful in this case such as the McMullen case 127 New Jersey Super, also the Caputo vs. The Best Foods case, although that was before the Court rule I mentioned. Fiore vs. Trident was another case, although that was not quite as direct because it dealt basically with the deductions under Section 95.5, but all those cases I do believe support the proposition that I summarized earlier, and that is that the upper limit is 33 1/3 percent, number one, number two, that you compute this bases on the total recovery in the comp case, and if that is less than what is being received in the third party action, you take the fees from the first dollars received. By taking it from the first dollars received on the part of the employee, you then maximize the actual percent of the fee, because the first dollars would fall within the first $500,000 and the first $500,000 under rule 1:21 is 33 1/3 percent. So in these cases, in Streeper and in Kuhnel, it's clear that a full 33 1/3 percent would be warranted as a deduction from what is reimbursable under the Section 40 lien. And I specifically reject the contention that the blended rate is more appropriate under the circumstances, as I believe the cases say.

The next issue to be addressed is the plaintiff's motion to dismiss the defendant's counterclaim. The defendant's counterclaim in Kuhnel basically is a effort by the defense to

simply label its view that the petitioner/plaintiff was seeking too much money, and it labels that as fraud, it labels that as unjust enrichment, it labels that as fraud based on an over charge, fraud based on miscalculation, but this Court has concluded that the 33 1/3 percent fee is correct. This Court has concluded that the lienable items contested were properly contested, and therefore, in my judgment, on the merits, all of those counter claims fail. The factual premise that there was an over charge is rejected and I do not believe that there is even a factual question that would require the denial of this summary judgment motion by the plaintiff.

The analysis may need to go a little bit further with respect to the so-called miscalculation counterclaim. The defense suggest that that constituted an intentional wrongdoing. Frankly, I tended to think that this was simply an effort by the defense to match the plaintiff's claim that wrongdoing on the part of its side constituted fraud, so I saw this as kind of tweeking counter claim as such, but I reject it. I reject it because I'm not prepared to assume that simply because there was an error, that that creates an inference of wrongdoing, I'm sorry, an inference of intentional wrongdoing. Unless the Court's prepared to say that every time an error made that creates a factual question as to whether that error was intentional, I think this motion should be granted, and I don't think that is the law. It seem to me that you need something more than a simple miscalculation to generate a factual question on the issue of fraud. So the counter claims will be dismissed.

The next motion is the application for summary judgment on the plaintiff's fraud claim, that is count three, and as I indicated earlier, my intention is to grant this motion as well. In assessing summary judgment motions in general, although I haven't mentioned this earlier, we all know from the current practice regarding these motions that the major cases in this area are the Judson case, and most recently Brill vs. Guardian Life. Under Brill we know that the flexibility of the trial Judge is somewhat greater than was previously seen, and there is some degree of weighing that may be legitimate, although it is confined

as that case recites.

The plaintiff's position here is essentially as follows. These carriers over charged these plaintiffs for what was lienable, and they did it with respect to other plaintiffs as well, and they did it knowing that this was erroneous and they did it anyway. That set of factual claims is, in my judgment, unsupported. I am very sensitive to the requirement in a summary judgment setting that the Court accept the opponent's version of the facts in determining whether such a motion should be granted. However, I am also aware that simply because a factual conclusion is reached by the plaintiff does not mean that the Court is required to embrace such a factual conclusion. I'm also aware that under rule 1:6 affidavits must be on personal knowledge in order to be competent, and in this case, I'm not aware of any competent evidence that would support the plaintiff's position or even create a factual question in that regard. There is a reference in plaintiff's counsel's affidavit to the effect that one of the CNA representatives admitted that there was no firm policy on the subject of what is lienable. That fact does not convince me that there is a factual question as to the issue of fraud. The fact that there is no firm policy or even inconsistency doesn't raise the inference of fraud, and therefore, it's not an inference that this court is required to embrace. I recognize, of course, that defendant relies on the so-called CRIB manual for what it did, and I think that's helpful but I don't think that's dispositive on the merits, for reasons I'm going to mention in a moment, but I do think it is helpful in this weighing process to the extend that the Court may engage in it.

I haven't explained what CRIB is up to now, so let me do that here. CRIB refers to the Compensation Rating and Inspection Bureau. The Compensation Rating and Inspection Bureau is a group of insurance carriers authorized by statute, which has its own manual dealing with issues of rating, etcetera, and it is the defendant's position that the inclusion of these disputed items was consistent with the manual. Well, I don't find that dispositive on

the merits of whether these things are lienable, but I do mention it here in connection with count three because I think it is at least a facially supportable process that is at least a more competent form of evidence that has been proffered by the other side to give some support to the conduct. Even without the CRIB manual, however, I think it would be my conclusion that the plaintiff has not created a legitimate factual question on the issue of fraud.

Fraud requires a showing of a misrepresentation of a fact knowing it's untrue and knowing that it would be relied on to the detriment of the listener. In this case, the factual premise of knowing misrepresentation is simply not there. Everyone concedes that this is an issue of first impression. If this is an issue of first impression, and I believe it to be, I don't agree that there was any way for the defendants to know, that what they were charging by way of, for example, a reimbursement of the respondent's share of the petitioner's attorney's fees, was wrongful. It didn't know that because there was nothing out there that said it was wrong. There's nothing out there that said it was wrong until this court said it was wrong, and/or Judge Kumpf said it was wrong. So what happened back in 1984, or the operative date when this lien was being charged, in my judgment, would not have included the knowledge that the plaintiff seeks to impart to the defendant. That's number one.

The same thing is true of negligence. In order for there to be negligence there has to be a duty. In order for there to be negligence there has to be a breach of that duty. There was no duty at this time to not charge these items because there was no legal guidelines out there that would have suggested that result. It is not until now, within the framework of this lawsuit, that that guidance has been reached, and therefore, it's my judgment that negligence doesn't apply either.

Going back to the CRIB manual for just a minute, I mentioned earlier that I didn't think it was persuasive or dispositive with respect to the merits of the issue of lienability.

Part of my reasoning there is simply that I don't think it's ever been made clear as to what the CRIB manual actually stands for and what impact it has. It's clearly not part of any Administrative Code. The group that is involved is basically an industry group, and although I think the fact that it exits is significant and helpful, I don't believe that defendant's claim that the process contemplated by its manual is dispositive on the issue of what is lienable. And nor, by the way, do I even recall being told exactly what the CRIB manual says about all this and whether it deals with rating or whether it deals with compensation, etcetera. But in any event, my conclusion is that it is not sufficient to support the defendant's position on the substance of these claims, and I'm referring now back to the lienability issue, not the fraud claim which I've just dismissed.

I recognize that the plaintiff claims that discovery is not complete on this issue, and that because this issue involves arguing a question of intent and because questions of intent are normally not dispositive in a summary judgment motion, but I don't find those arguments persuasive. For one thing, this case is almost three years old, and although I recognize that there is conceivably more discovery that could go on here, if permitted, I don't think it's enough to simply point to the potential for discovery after all this time. I think someone needs to point to actual probable result here to allow the Court to conclude that discovery would be fruitful in this issue and I haven't seen that, and I don't believe discovery, it doesn't support the plaintiff, in my judgment.

The final issue to be decided is whether to apply this ruling retroactively or prospectively, and if it is to be applied retroactively, what does that mean in this context? This was one of the most perplexing issues for me in a case that was full of perplexing issues. The plaintiff seeks to apply the current rulings not only retroactively in the sense that it would apply to present plaintiffs and the events that took place in August of 1994 when the lien was asserted, but the plaintiffs also seek to have this

ruling apply to all those persons similarly situated, and by that the plaintiffs mean, presumably mean, all the person's whose comp files were open as of 11-27-88, which was the date made part of the certification in Kuhnel previously. I'll referring now to the Court's order of October 25th, 1996.

The case law does not give us a bright line test for purposes of resolving this issue, but there is guidance, and we know, for example, that determinations of whether decisions should be prospectively or retroactively is difficult. We know as well that uncertainty with respect to the interpretation of the statue normally would mitigate in favor of a prospective as opposed to a retroactive application, and authority for that can be found in Chase Manhattan Bank vs. Josephson, 135 New Jersey 209. Three factors are usually considered in this framework. One is what is the purpose of the new ruling and will it be furthered by a retroactive application; two, what reliance has there been, if any, on the former rule, assuming there was a former rule; and three, what is the effect that a retroactive application would have on the administration of justice? Those guidelines are found in a number of cases including Frazier, which I mentioned earlier, that is Frazier vs. New Jersey Manufacturers Insurance. I would also refer to Montells vs. Haynes.

The problem with the kind of retroactive application that the plaintiff seeks here is the impact that it would have, or potentially have on all the cases which have been resolved over the years, and when I say resolved, I mean cases that went to judgment or where releases were executed by the parties and where closure occurred. To disturb al of those hundreds or thousands of cases that could potentially be impacted by a ruling that went back six years would be dramatic, so the Court has to ask itself, what is there about this case that would motivate the Court to take such, I'll say, drastic approach to the resolution of this problem? If there was some egregious conduct, as these complaints suggested, it seems to me that that might be incentive for disturbing, and probably would be incentive for disturbing

these prior cases, but I haven't found that in these cases. There was no definitive guidance out there for CNA or Aetna in 1994 or three or two or one or before that, that would have told them, with any kind of clarity, that these charges were improper. That doesn't convince me that they were proper, but it does persuade me that their actions would not be, in any way, purposefully wrong or fraudulent or egregious or any of the other labels that might warrant a sweeping kind of conclusion that the plaintiffs have suggested here. And in terms of the impact on the administration of justice, it seems to me that the impact would be significant and negative.

I'm satisfied that, given the absence of intentional wrong doing, given the absence of guidelines, given the very murky language of the Worker Compensation Act, there is nothing here to convince me that the Court should reach further than is necessary to implement this ruling. So it is my conclusion that the rulings that I've made should apply retroactively to this extent only, they should apply to the current plaintiffs because I believe that the current plaintiffs deserve the benefits of this ruling given the investment that they made. And I believe that this ruling should also apply to any other plaintiffs similarly situated who have not yet gone to judgment or reached an agreement incorporated by a writing or release. Stated differently, to the extent that there are pending cases out there for which the lienability of these items is still an open question, this ruling would apply and would bind CNA and would bind Aetna. Beyond that, the ruling would simply apply prospectively. That is the ruling of this Court.

In sum, let me simply say, to reiterate what I have already ruled, number one, I believe this Court has jurisdiction to hear these claims, and I believe that the prior transfers do not deprive the Court of jurisdiction. I believe that to the extent that this Court has embraced the ruling of Judge Kumpf and Judge Parks, this issue of jurisdiction is, to a large extent, academic. Number two, I believe that a declaratory judgment is appropriate in both

cases, both in Streeper and in Kuhnel, and I have rendered that declaration as part of my ruling. I have determined, for example, that these carriers and others are precluded from including in their liens defense costs such as respondent's share of the petitioner's attorney's fees of the respondent's share of the petitioner's expert fees and/or defense examinations. With respect to rehabilitative nursing services so-called, it is my view that they are generally not lienable and they are not lienable except in those cases where the services primarily benefit the employee and are determined to be reasonably necessary for the injured employee's recovery.

Next, I've concluded that the defendant's obligation with respect to attorney's fees is the full 33 1/3 percent of the actual amount owed, and that the appropriate percentage will be based on the first dollars paid. In these two cases that means the full 33 1/3 percent. I have found as well that Kuhnel is entitled to have CNA counter claims dismissed as a matter of low, and I've determined that CNA is entitled to have count three of the plaintiffs complaint dismissed as a matter of law. I determined that Streeper's motion for summary judgment, that is cross motion for summary judgment with respect to declaratory judgment should be denied, to the extent that I have stated it. Actually, I believe this is a denial in part and a granting in part because, to some extent, I've agreed with the defense position on what should be included in the declaration, assuming I were to grant one.

Finally, I decided that the present decision should have applied retroactively but only in the sense that it applies to the current plaintiffs and others who have not yet settled or gone to judgment. In all other respects it will apply prospectively.

I'll ask Mr. Kitchenoff to prepare an appropriate order and submit it to me under the five day rule. I'm sure that will be fine. Are there any questions regarding my ruling? I see you sanding, Mr. Vesper.

MR. VESPER: Yes, Your Honor. Insofar as your last

ruling as to retroactivity of your declaration, if you — if you phrase in the terms of gone to resolution or gone to judgment, my only question to the Court is that if CNA and Aetna now know that they are not supposed to accept or lien items that you've ruled upon, then what happens tomorrow, because there is no rule, Judge, if tomorrow they receive in the mail a check for a lien, which check they know includes improper amounts, so my question to the Court is, could your ruling as to retroactivity or pro — actually it's really the prospective part of your ruling, shouldn't it also include the receipt of checks, because there is no judgment when you pay the lien, it's just an exchange, it is the plaintiff lawyer sends to the carrier a check.

THE COURT: And there are no releases exchanged?

MR. VESPER: I believe that some carriers do ask for releases, but really the operative event is the receipt by the carrier of the check, so they could theoretically, tomorrow, next week, receive checks, forget whether there has been releases signed. They are getting a check and they know that that check includes the amounts that you've ruled upon, I would — I'd think they should say, all right, there is a dispute, we're going to appeal, we're going to go — whatever they are going to do. Maybe they won't appeal, but if they are going to appeal, should they send the checks back and say there is an amount in dispute, we ask you to hold it in escrow?

THE COURT: Okay, I understand your position. I'm not prepared to respond to it yet.

MR. VESPER: But that's a practical problem.

MR. JONES: My question, Your Honor, is as of what date, because from the time that this case was filed until today, the date of Your Honor's decision, there have been a number of liens resolved, and so would Your Honor's ruling apply to those cases that have been resolved already?

THE COURT: That wasn't my intention to apply it to cases already resolved.

MR. JONES: I mean, resolved between the date of the filing of the complaint and today.

THE COURT: Well, frankly, I hadn't thought about that, but I did not intend, no one asked me nor would I have been receptive to it, I don't think, even if I had been. I did not intend that the filing of this complaint was the operative date for purposes of a cutoff. I was assuming the date of the decision was the operative date. Tom, I believe your question is a legitimate question. I think it's probably a question that we should discuss informally and probably it would be helpful for us to have a conference with respect to the form of the order, because my guess is there is going to be some disputes about that. I hope not, but I think it would probably be worth the investment of time, and your question I will address then. Okay?

MR. VESPER: Thank you, Your Honor.

THE COURT: Anything else? Okay.

Supreme Court, U.S.
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(2)

No. 99-1945

IN THE

Supreme Court of the United States

DIANE KUHNEL, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated,

Petitioners,

v.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee, CONTINENTAL CASUALTY CO., AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, TRANSCONTINENTAL INSURANCE COMPANY, TRANSPORTATION INSURANCE COMPANY and VALLEY FORGE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY APPELLATE DIVISION

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD V. JONES
ROGER V. JONES
LAWRENCE D. ROSS*
BRESSLER, AMERY & ROSS
A PROFESSIONAL CORPORATION
Attorneys for Respondents
325 Columbia Turnpike
Florham Park, NJ 07932
P.O. Box 1980
Morristown, NJ 07960
(973) 514-1200

* *Counsel of Record*

160732

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the decision of the trial court to apply a limited retroactivity to its interpretation of N.J.S.A. 34:15-40 violated the equal protection and due process rights of class members and the Supremacy Clause of the United States Constitution.

PARTIES TO PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The brief of Petitioners accurately lists the parties to this proceeding. CNA Insurance Companies is not a legal entity; it is a service mark for several insurance companies. Respondent, Continental Casualty Co., is the parent company of all the other Respondents. No publicly held company owns 10% or more of the stock of these companies and Continental Casualty Co. is a wholly owned subsidiary of CNA Financial Corp.

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28 U.S.C.A. § 1254(1) 2

28 U.S.C.A. § 1257(a) 2

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Respondent, CNA Insurance Companies ("CNA"), respectfully requests that the Petition for a Writ of Certiorari filed by Petitioners, Diane Kuhnel, individually and on behalf of all other workers' compensation lien payers, be denied.

OPINIONS BELOW

Petitioners filed a class action in the Chancery Division of the Superior Court of New Jersey, *Kuhnel v. CNA Insurance Companies*, Docket Number ATL-C-184-94, N.J. Super. (Ch. 1994), claiming that she and others were deprived of their full workers' compensation recovery by the CNA Insurance Companies ("CNA") since the lien against a third party recovery included the insurer's portion of her attorney's fee and experts' fees.

The New Jersey Workers' Compensation Act, at N.J.S.A. 34:15-40, provides that an insurer's lien against a third party recovery shall include medical benefits and compensation paid to the worker. CNA claimed that "compensation" included all fees payable to the employee's attorney and experts. The trial court ruled that the term "compensation" did not include the employer's/insurer's portion of the attorney's fee and the experts' fees and applied that ruling retroactively to Ms. Kuhnel and other class members who had open claims, but refused to reopen closed claims. Reopening closed claims would create chaos in the judicial system and the trial court found that there was no reason to disturb closed cases. The Appellate Division agreed. The New Jersey Supreme Court denied Petitioners' Petition for Certification.

COUNTERSTATEMENT OF JURISDICTION

Respondent objects to Petitioners' claim that jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1). This Court lacks jurisdiction under 28 U.S.C.A. § 1254(1) as this not a case from a court of appeals. The jurisdiction of this Court, if any, is properly invoked under 28 U.S.C.A. § 1257(a).

STATEMENT OF FACTS

Respondent relies upon the facts as stated in the Appellate Division's opinion at *Kuhnel v. CNA Insurance Companies*, 322 N.J. Super. 568 (1999).

COUNTERSTATEMENT OF BACKGROUND

In their Petition for Certiorari, p. 3, Petitioners indicate that, prior to the Chancery Division's decision, the class was certified. That statement is misleading. While a class was certified, it was not perfected because the members of the class were not notified. The class was initially described as all employees who received workers' compensation payments against which a lien was asserted by the employer or its insurance company. In fact, the class had two types of claimants, although not specifically delineated as such: those with open claims and those whose claims had been closed by settlement, judgment or otherwise.

Petitioners also incorrectly state Judge Gibson's holding and its application as:

> The Court also held that the return of the wrongfully included lien amounts would be

> limited to only the named plaintiff individually, and denied recovery to the class members who were similarly situated. The ruling applied prospectively only, except for plaintiff, despite the status of the class numbers as parties to the action.

Petition for Writ of Cert., p.3.

The pertinent part of Judge Gibson's holding is as follows:

> So it is my conclusion that the rulings that I've made should apply retroactively to this extent only, they should apply to the *current plaintiffs* because I believe that the current plaintiffs deserve the benefits of this ruling given the investment that they made. And I believe that this ruling *should also apply to any other plaintiffs similarly situated who have not yet gone to judgment or reached an agreement incorporated by a writing or release*. Stated differently, to the extent that there are pending cases out there for which the lienability of these items is still an open question, this ruling would apply and bind CNA and would bind Aetna. Beyond that, the ruling would simply apply prospectively.

Appendix C to Petition for Writ of Cert., p. 28C (emphasis added).

Moreover, Petitioners incorrectly indicated that "no pre-decision briefing or argument relating to the retroactivity issue occurred at the trial court level . . ." Petition for Writ

of Cert., p.3. Respondent did brief the retroactivity application issue at the trial court level. (Appendix A, attached hereto).

The issue advanced by Petitioners was not raised below. Petitioners admit that they "never specifically raised the Fourteenth Amendment in its brief or argument", saying that they raised it by inference ("repeatedly argued the obvious inequities"), yet they identify it as a controlling question in their Petition for a Writ of Certiorari. Petition for Writ of Cert., p. 3. Petitioners only presented one question to the New Jersey Supreme Court in their petition for certification:

> In a class action where the class has been certified, may a Court, when rendering a declaratory judgment interpreting a statute, restrict the application of its declaration of what the law is to apply only to the named plaintiff and thereafter prospectively only, while entering a judgment applying the incorrect law to the other parties who are similarly situated members of the certified class? App. 4A to Petition.

SUMMARY OF ARGUMENT

The decisions of the Chancery and Appellate Divisions of New Jersey do not conflict with this Court's decisions on the retroactive application of a law. The New Jersey Courts applied state law consistently with this Court's retroactivity doctrine. Consequently, the class members were not denied equal protection or due process by the New Jersey courts' decisions nor was the Supremacy Clause violated.

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court's decisions in *James B. Beam Distilling Company v. Georgia, et al.*, 501 U.S. 529 (1991) and *Harper v. Virginia*, 509 U.S. 86 (1993) vitiated the analysis of retroactivity in *Chevron Oil Co. v. Huron*, 404 U.S. 97 (1971). Petitioners reason that since the New Jersey courts relied upon *Coons v. American Honda Motor Co.*, 96 N.J. 419 (1984), *cert. denied*, 469 U.S. 1123 (1985) (hereinafter referred to as "*Coons II*") which, in turn, applied the *Chevron Oil* retroactivity test, the lower court decisions are unconstitutional and inimical to the due process and equal protection provisions of the United States Constitution.

The trial court reached its decision in accordance with this Court's decisions in *Beam* and *Harper*. In *Beam*, this Court specifically stated that:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. *Beam*, 501 U.S. at 544.

In *Harper* it held that:

> *Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of justices in *Beam*: When this Court applies a rule of federal law to the parties before it, that rule is a controlling interpretation of federal law and must be given full retroactive effect in all

> cases still open on direct review and as to all events, regardless of whether such events pre-date or post-date our announcement of the rule. *Harper*, 509 U.S. at 97.

Judge Gibson's decision and the Appellate Division's affirmance conforms to this Court's holdings of *Harper* and *Beam* despite neither court citing them. Although the rule applied by Judge Gibson was an interpretation of a state law, he applied it in the same manner this Court would apply an interpretation of a federal law: "[t]o the parties before the court and all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers", *Beam*, 501 U.S. at 535; "to any other plaintiffs similarly situated who have not yet gone to judgment or an agreement incorporated by a writing or a release." Gibson, App. 28C to Petition. Petitioners also misstate the trial court's holding as not applying to "litigants in pending cases." Petition for Writ of Cert., p.8. Judge Gibson clearly holds that his rulings apply to those "pending cases out there for which the lienability of these items is still an open question. . . ." Gibson, App. 28C to Petition.

Petitioners are trying to invoke the assistance of this Court to review this matter by claiming due process and equal protection violations by stating that claimants with open claims are in the same position as those with closed claims. Petitioners with closed claims have not been denied their due process or equal protection rights. They were represented by counsel in workers' compensation and civil courts. They had their opportunity to object to lien amounts, and did not.

The trial court and Appellate Division recognized this by indicating that to reopen the "hundreds or thousands" of

closed cases would create judicial chaos. Despite the differences between the class members, Petitioners are asking this Court to extend the holdings in *Beam* and *Harper* to all Americans thereby eliminating the discretion given to state courts to determine how to retroactively apply state laws. In *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 364 (1932), this Court held that the United States Constitution does not prevent a state from defining the limits of retroactive application of a state court's decision construing state law. Any choice as to whether to apply a decision prospectively or retroactively may be determined by the "juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Sunburst Oil*, 287 U.S. at 365. It is important for New Jersey courts, as well as other states' courts, to retain the ability to evaluate each issue of state law before them by analyzing different factors and applying those factors to the specific case. State courts are in a better position than this Court to interpret a state statute or rule of law and to decide whether it should be applied retroactively or prospectively.

As this Court has acknowledged in *Beam*, "retroactivity in civil cases must be limited by the need for a finality, (citation omitted) once a suit is barred by res judicata or a statue of limitations or repose, a new rule cannot reopen a door already closed". *Beam*, 501 U.S. at 541 (*citing Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940)). The door has been closed and locked as to those Petitioners that have gone to judgment or have reached an agreement incorporated by a writing or release.

CONCLUSION

Petitioners' Petition for a Writ of Certiorari should be denied because this Court's jurisdiction is not properly invoked. The questions presented to this Court were not raised in the lower courts. The rulings of *Beam* and *Harper* were properly applied by the New Jersey courts in this matter. The state court has discretion in the prospective or retroactive application of its decisions. Accordingly Respondent respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

RICHARD V. JONES
ROGER V. JONES
LAWRENCE D. ROSS*
BRESSLER, AMERY & ROSS
A PROFESSIONAL CORPORATION
Attorneys for Respondents
325 Columbia Turnpike
Florham Park, NJ 07932
P.O. Box 1980
Morristown, NJ 07960
(973) 514-1200

* *Counsel of Record*

APPENDIX

APPENDIX — EXCERPTS FROM DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT DATED OCTOBER 22, 1996

BRESSLER, AMERY & ROSS
A Professional Corporation
325 Columbia Turnpike
Florham Park, N.J. 07932
P.O. Box 1980
Morristown, N.J. 07962
(201) 514-1200
Attorneys for Defendant
Insurance Companies Operating
under the CNA Servicemark

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ATLANTIC COUNTY
DOCKET NO. ATL-C-184-94

Civil Action

DIANE KUHNEL, Individually and on behalf of all other Workers' Compensation Lien Payors, similarly situated,

Plaintiffs,

v.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee,

Defendant.

Appendix

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE FOR PARTIAL SUMMARY JUDGMENT

BRESSLER, AMERY & ROSS
A Professional Corporation
325 Columbia Turnpike
Florham Park, N.J. 07932
P.O. Box 1980
Morristown, N.J. 07962
(201) 514-1200
Attorneys for Defendant
Insurance Companies Operating
Under the CNA Servicemark

Of Counsel:
Richard V. Jones

On the Brief:
Donna Michael-Ziereis

* * *

Appendix

[43] **POINT V**

IN THE ALTERNATIVE, SHOULD THE COURT BE INCLINED TO GRANT DECLARATORY JUDGMENT IN FAVOR OF PLAINTIFFS, THE SAME SHOULD APPLY ONLY TO DIANE KUHNEL AND OTHERS WHO HAVE NOT YET PAID OR SETTLED THEIR LIEN.

Should the Court be inclined to grant declaratory judgment in favor of plaintiffs, the same should apply to Diane Kuhnel and otherwise only be applied prospectively to current "open" files and to future workers' compensation claims.

The question of application of a decision retroactively or prospectively is "among the most difficult problems that engage the attention of courts." *County of Essex v. Waldman*, 244 N.J. Super. 647 (App.Div. 1990). Where there is uncertainty over an issue in respect to interpretation of a statute a decision should be applied only prospectively. *See Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 235 (1994). Three factors are considered:

> (1) the purpose of the new rule and whether it would be furthered by retroactive application; (2) the reliance placed on the old rule by those charged with administering it; and (3) the effect that retroactive application would have on the administration of justice.

State v. Burstein, 85 N.J. 394, 406 (1981); *Frazier v. New Jersey Manufacturers Ins. Co.*, *supra*, 145 N.J. at 19.

Should this Court be inclined to grant plaintiff's motion for declaratory judgment, the purpose of the rule would be to govern the conduct of insurers and workers' compensation [44] petitioners in respect to what might be claimed as a lien. Retroactive application would jeopardize prior settlements and judgments. The tradition of finality of decision and settlement would be greatly disturbed and insurers who followed the practice employed by CNA in this case would be greatly prejudiced.

As set forth at Argument II, *supra*, and as indicated by the affidavits discussed therewith, CNA established its computer payment systems to allow it to properly classify and report payments as required by CRIB. CRIB's manual and workers' compensation insurance rates in the State of New Jersey were projected based on those reports. Assessments for the special funds administered by the Department of Labor were also based on total compensation paid as reported by CNA, which included the respondent's portion of assessments in favor of petitioners for attorneys and experts. Thus, the Compensation Rating and Inspection Bureau relied on the concept that the respondent's portion of petitioner's attorney's and expert fees were benefits to the petitioner, and therefore were loss and indemnity payments included in subrogation.

Should this Court change that concept, it should be applied only to open and future matters. CNA reasonably relied on CRIB and the Department of Labor, the agency

responsible for administering the Workers' Compensation Act. The effect of any new rule would substantially change the manner in which payments of compensation are reported to the Compensation Rating and Inspection Bureau. The Bureau would have to revise its Manual [45] and the rating structure. The retroactive effect of such a ruling on CNA would be financially detrimental. It reported and paid special fund assessments based on its understanding of the requirements of the Act and the Manual. It has no way to recoup what would amount to overpayments.

Such a ruling would also have an adverse effect on the state special funds in that the reports of the employers and insurers of amounts of total compensation paid would be reduced by approximately 12% (where there is an award of 20% attorney's fee, assessed 60% against the respondent). This would apply not only to matters involving a lien but to every case where there is an award of an attorney's fee.

Therefore, should this Court grant declaratory judgment to plaintiffs, application of the same should be limited to Diane Kuhnel and others who have not yet repaid or settled their lien, and to future petitioners.

* * *

[50] CONCLUSION

For the foregoing reasons, CNA respectfully requests that Plaintiffs' Motion for Partial Summary Judgment, Declaratory Judgment and Dismissal of CNA's Counterclaim be denied and that its Cross-Motion for Summary Judgment be granted.

Appendix

Respectfully submitted,

BRESSLER, AMERY & ROSS, P.C.
Attorneys for Defendant
Insurance Companies Operating
under the CNA Servicemark

By: s/ Richard V. Jones
Richard V. Jones

Dated: October 22, 1996

(3)

No. 99-1945

In The

Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

SUPREME COURT OF THE UNITED STATES

DIANE KUHNEL, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated,

Petitioners,

vs.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee, CONTINENTAL CASUALTY CO., AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, TRANSCONTINENTAL INSURANCE COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Superior Court, Appellate Division

REPLY TO BRIEF IN OPPOSITION

THOMAS J. VESPER, ESQUIRE
Counsel of Record
WESTMORELAND, VESPER & SCHWARTZ
BAYPORT ONE, SUITE 500
WEST ATLANTIC CITY, NJ 08401
Attorneys for Petitioners

Rep

QUESTIONS PRESENTED

In a class action does a state court decision that applies the benefit of its ruling to the Petitioner/class representative and thereafter prospectively only, while denying the similarly situated class members a remedy, violate the Fourteenth Amendment of the United States Constitution by denying petitioners their due process and equal protection rights?

Does a state court that adopted the federal retroactivity doctrine and continues to use that doctrine after it has been overruled by the Supreme Court of the United States violate the Supremacy Clause of the United States Constitution?

Do state courts have more discretion than federal courts to pick and choose who shall have the benefit of a ruling when to do so has been found to be a violation of a constitutionally grounded, fundamental right of equal treatment of litigants?

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Petitioners, Diane Kuhnel, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated, respectfully request that a writ of certiorari be issued to review the judgment of the New Jersey Superior Court, Appellate Division, in this case.

OPINIONS BELOW

The New Jersey Supreme Court denial of certification is not published and unreported. The New Jersey Superior Court, Appellate Division, is reported at Kuhnel v. CNA Insurance Companies, 322 N.J. Super. 568 (1999). The opinion of the New Jersey Superior Court, Chancery Division, sub-proceeding Docket Number ATL-C-184-94 made November 6, 1997 is not published and unreported.

STATEMENT OF JURISDICTION

The decision of the New Jersey Superior Court, Appellate Division was made on June 30, 1999. The New Jersey Supreme Court denied petitioners' application for certification on January 21, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

SUMMARY OF RESPONDENTS' ARGUMENT

Respondents admit that the trial court applied limited retroactivity to its decision (see Respondents' Brief in Opposition, Questions Presented) and yet contend that trial court's decision was in accordance with James B. Beam Distilling Co. v. Georgia, et al, 501 U.S. 529 (1991) and Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993), which clearly held that limited retroactivity was unconstitutional and not an option available to lower courts in the federal system.

Respondents seem to infer that the claims of the class members as parties to the action below were somehow barred by procedural requirements or res judicata and, therefore, excluded from the Harper and Beam holdings. Finally, Respondents attempt to show that Judge Gibson's decision below did not exclude all pending cases, suggesting that claims not yet in existence could pass for pending cases.

ARGUMENT

Respondents claim that there was no conflict with decisions of the United States Supreme Court and that the holding by the New Jersey state court in the present case was consistent with the decisions in Harper and Beam, inferring that the class members were denied a remedy and were barred from the benefits of the decision, "...by procedural requirements or res judicata" Beam, 501 U.S. at 544, or "...cases (not) still open on direct review..." Harper, 509 U.S. at 97.

Unfortunately, the Respondents do not point out or even allege that the class claims were not open to direct review because they clearly were; or that res judicata applied because it clearly did not; or, that there was a procedural requirement which barred the class members, because no such procedural requirement was ever raised or now exists.

The trial court's decision to apply the benefits of its ruling to the named Petitioner/class representative and not to the similarly situated class members was in fact an application of limited retroactivity, in direct contravention to the Harper and Beam decisions. Respondents' "Point I" of its argument to the New Jersey Appellate Division reads, "The trial court properly applied limited retroactivity to its holding". (Page 7, Reply Brief, Superior Court Of New Jersey, Appellate Division) They continued to argue (in their brief) that limited retroactivity was

consistent with New Jersey law, which had been based on the holding in Chevron Oil v. Huson, 404 U.S. 97 (1971), before it was modified by this Court, declaring the application of limited retroactivity unconstitutional. Now, however, since they have become aware that Beam, Harper and other cases have significantly overruled Chevron, they retreat from their original argument and contend instead that the lower court's decision conforms to Harper and Beam. It clearly does not.

Its most obvious obfuscation, however, is its attempt to confuse this Court by quoting the lower court's decision and arguing a few fortuitous and meaningless words from that decision.

Respondents seem to contend that Judge Gibson's decision only excluded those members of the Class that would have been excluded by Beam and Harper; i.e., barred by procedural requirements or res judicata, or who had no right of direct review, but that is patently false and misleading. No such bar exists or existed, nor have Respondents suggested any.

They then suggest that because Judge Gibson's decision says, "to any other Petitioners similarly situated who have not yet gone to judgment or reached an agreement incorporated in a writing or a release" (See Appendix C to Petition for Writ of Cert., p. 28C) that it somehow changed or avoided the limited retroactivity label they had already given it. It did not.

Respondents say that the Court, by using the words similarly situated, inferred that other similarly situated Petitioners could recover. This of course is a contradiction in terms, as will become clear below.

Diane Kuhnel was injured while working. Her workers' compensation attorney recovered workers'compensation benefits for her from her employer's insurance company, but because a third-party had been negligent in causing her injury, she hired a

personal injury attorney to prosecute her third party claim. Because New Jersey prohibits double recoveries, it provides in N.J.S.A. 34:15-40 of Workers Compensation Statute that the insurance company has a reimbursable lien for certain payments they made from any third-party recovery. Years later when she settled her third-party action, she requested the amount of the lien from the workers' compensation carrier. The company sent her a lien letter demanding payment for 'x' dollars, which was paid from her third-party recovery. In this subsequent action the Court found that the insurance company had included several items and amounts not permitted by statute and ordered that the lien be reduced by the illegal charges.

This process of paying insurance company liens from third-party recovery is repeated thousands of times each year in New Jersey. This lien transaction is not part of any court proceeding and there are no orders, judgments or releases entered or executed. There is merely a demand letter and subsequent payment from the third-party recovery. It is similar to a seller of a home requesting a payoff statement from the mortgage holder so that the mortgage can be paid off out of the proceeds of the sale.

When the original complaint was filed, it described the class members as those people similarly situated to the Petitioner/ class representative whose claim was ripe for litigation, thereby requiring class membership to include only those whose claims were ripe for litigation. All class members had to be similarly situated with the Petitioner, and like the Petitioner/ class representative, had to have received lien letters and paid the requested amounts that included those items declared illegal. Judge Gibson's language ("who have not yet gone to....an agreement incorporated by a writing...", see Appendix C to Petition for Writ of Cert., p. 28C) could only have encompassed people who had not received and paid a lien letter; that is to say, only people to whom no cause of action had yet accrued, which effectively made his decision purely prospective and any argument to the contrary is spurious and deceptive. Harper and Beam

sought to make a holding applicable to the Petitioner and those whose cause of action had already accrued and who were litigants in pending cases. This is the exact scenario presented to the lower court in the case at bar.

Judge Gibson's unfortunate language did not effectively extend the benefits of his holding to anyone other than those with prospective claims. He may have unwittingly been unaware of that fact, but his words were of no significant import to those with pending claims. Put another way, there were no existing claims pending for violation of Section 40 that were not excluded by his decision. And while there were likely to be potential claims, they would be covered by the prospective application of the decision in the future.

Respondents say that the class claims were closed, but what they mean is that the Respondents had already asserted and collected their improper lien, taken the illegal money and closed their file. No court was involved in that transaction and the only burden to the determination of damages would be on producing the company's records of a breakdown of payments received. No court or judicial system would be burdened and Respondents have never produced any evidence to that effect.

Respondents contend that somehow Petitioners' opportunity to object to lien amounts when they are asserted constitutes a judicial proceeding in which they were litigants. This is not the case as illustrated above. In addition, the Petitioner/ class representative had the same opportunity to contest the amount of the lien and yet the court did not consider that opportunity relevant. Furthermore, Petitioners had no reason to believe that the lien letter they received was not accurate and within legal standards.

Respondents clumsily say that the class had two types of claimants, open and closed. This is a shameful mischaracterization. The definition of the class was as clear as it

was routine, that they were similarly situated to the Petitioner/class representative, whose claim had matured by virtue of Respondents' demand for payment of its lien and withholding of monies from her recovery to pay it. Her claim was a closed claim, as were those of all class members. Open claims, as we have said above, are not claims at all, but merely potential claims that could arise in the future.

Respondents make much of the lack of notice to the class that was certified, asserting the New Jersey Appellate Division reference to an unperfected class. Both the Appellate Division and Respondents were mistaken and had not realized that the class in Kuhnel was certified under New Jersey Court Rule, R. 4:32-1(b)(2) which does not require notice. In a (b)(2) class, once the class is certified, the members of the class are automatically bound as parties to the action by any declaratory judgment. The trial court decision was a declaratory judgment and bound all class members who were parties. Therefore no notice was necessary.

Lastly, the Respondents attempt to say that the Petitioners are asking this Court to eliminate a state court's discretion to apply a decision prospectively or retroactively. This is simply not true. The Petitioners only ask that when the courts are applying a decision, that they apply that decision equally to all, similarly situated members of a class action and not prospectively to some and retroactively to others.

CONCLUSION

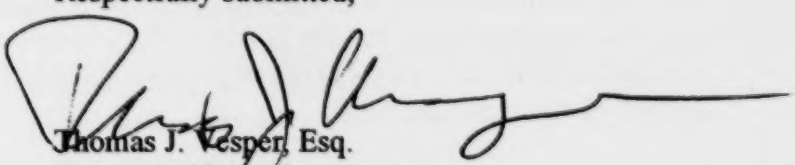
This is an unencumbered, clear cut example of a decision that could not have been made by a federal court. Both parties admit that the lower court applied its decision with limited retroactivity to the named Petitioner, but not to the class members who were similarly situated and were parties to the action, and whose claims had ripened. This result would not likely have happened in the absence of this Court's earlier decision in Chevron which was adopted by New Jersey courts and followed in

the case at bar. But this Court has repudiated that part of the Chevron holding which permitted limited retroactivity and has done so on constitutional grounds. The unconstitutional deprivation of rights that caused this court to repudiate Chevron has occurred here and undoubtedly continues to occur at the state court level nationwide. This unconstitutional doctrine, which was initiated by this Court, has since been prohibited in the federal courts and now must be prohibited in state courts as well.

The granting of this petition is necessary to make clear to all courts and litigants whether or not the Harper, Beam and other Supreme Court holdings on the Retroactivity Doctrine govern just the federal courts or the entire country. If those decisions, as they say, are based on constitutional grounds and "...derives from the integrity of Judicial Review which does not justify applying principles determined to be wrong to litigants who are or may still come to court.", as Justice Blackmun wrote in Beam 501 U.S. at 547-548, then granting this Writ is the just thing to do.

Accordingly, the petitioners respectfully request that this petition for Writ of Certiorari be granted.

Respectfully submitted,



Thomas J. Vesper, Esq.
Counsel of Record
Westmoreland, Vesper & Schwartz
Bayport One, Suite 500
West Atlantic City, NJ 08232